CERTIFICATE.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

No. 398.

WILLIAM J. MOXLEY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF ILLINOIS,

vs.

HENRY L. HERTZ, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF ILLINOIS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED MARCH 29, 1909.

(21,571.)

(21,571)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 775.

WILLIAM J. MOXLEY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF ILLINOIS,

vs.

HENRY L. HERTZ, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF ILLINOIS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 30, 1909.

1 In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1537.

October Term, A. D. 1908, January Session, A. D. 1909.

WM. J. MOXLEY, a Corporation Organized and Existing under the Laws of the State of Illinois, Plaintiff in Error,

v.

HENRY L. HERTZ, Collector of Internal Revenue for the First Collection District of Illinois.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

In this case, which has been argued and submitted to this court, questions of law arise concerning which the court desires the instruction and advice of the Supreme Court of the United States.

The Plaintiff in error brought suit (at law) in the trial court to recover the amount paid to the defendant in error, as collector of Internal Revenue, under constraint, as a tax of ten cents per pound, assessed by the Commissioner of Internal Revenue, for the manufacture by the plaintiff in error of 284,998 pounds of oleomargarine under due authority to engage in such business. Issues were joined and upon written stipulation by the parties were submitted to the court for trial without a jury. After hearing the testimony, the trial court made and filed a special finding of facts upon the several issues so submitted, and thereupon judgment was rendered against the plaintiff in error, whereof reversal is sought on writ of error.

The tax in controversy of ten cents per pound purports to be assessed under the provisions of section 8 of the Act of Congress approved May 9, 1902, published as Chap. 784, 32 U. S. Stat.
2 L. 193; and the present inquiry involves only the following of such finding of facts, viz:

(1) That in June, 1902, after the above mentioned enactment, "the Commissioner of Internal Revenue officially promulgated and published and issued in regular course by the United States Treasury Department, the regulation as to 'artificial coloration,' in language as follows:

"'*Regulation as to Artificial Coloration.*

"'If in the production of oleomargarine the mixtures of compounds set out in the law of 1886 are used, and these compounds are all free from artificial coloration and no artificial coloration is produced by the addition of coloring matter as an independent and

separate ingredient, a tax of one-fourth of 1 cent per pound only will be collected, although the finished product may look like butter of some shade of yellow. For example, if butter that has been artificially colored is used as a component part of the finished product oleomargarine (and that finished product looks like butter of any shade of yellow) as the oleomargarine is not free from artificial coloration the tax of 10 cents per pound will be assessed and collected. But if butter absolutely free from artificial coloration or cottonseed oil free from artificial coloration, or any other of the mixtures or compounds legally used in the manufacture of the finished product oleomargarine has naturally a shade of yellow in no way produced by artificial coloration, and through the use of one or more of these unartificially-colored legal component parts of oleomargarine the finished product should look like butter of any shade of yellow, this product will be subject to a tax of only one-fourth of 1 cent per pound, as it is absolutely free from artificial coloration that has caused it to look like butter of any shade of yellow."

"Which said 'Regulation as to Artificial Coloration' thenceforth continued to be the regulation of the Commissioner's office when the oleomargarine hereinafter referred to was made and sold by the plaintiff."

(2) The rulings and assessments in question by the Commissioner of Internal Revenue were made in 1903.

(3) "The oleomargarine, on account of which said assessment was levied by said Commissioner of Internal Revenue and said reduced amount thereof was required by him to be paid by said plaintiff, was composed of oleo-oil, lard, milk, cream, salt, and two vegetable oils commonly known as cottonseed oil and palm oil,
3 and of nothing else. The proportion of palm oil present in said oleomargarine was about one-half of one per cent. (½%) of the total volume of said oleomargarine. Palm oil is a pure vegetable oil derived from the fruit of palm trees, which grow in certain parts of Africa, and has about the consistence of pure butter. Palm oil consists almost entirely of palmatine and olein, which are the chief constituents of pure butter. Palm oil is perfectly wholesome, is readily digested, and has long been used as an article of food in countries where it is produced. Palm oil was successfully employed in oleomargarine prior to May, 1902; and is a proper constituent of oleomargarine. The oleomargarine involved in this suit looked like butter of a shade of yellow, and such resemblance to butter of a shade of yellow was caused by the presence of the palm oil used in said oleomargarine, and the levy of said assessment by said Commissioner of Internal Revenue was based upon and because of such resemblance to butter of a shade of yellow resulting from such use of palm oil in said oleomargarine. In addition to coloring the oleomargarine in resemblance to butter, the palm oil probably gives to the oleomargarine slightly better grain of texture, causing it to act more like butter in the frying pan, and it also caused said oleomargarine to have a better physiological effect upon the persons who ate it; but such function of the palm oil, other than

as coloring matter, was slight, and but for the coloring imparted to the oleomargarine, would not probably have been actually used in its manufacture."

Upon the foregoing facts—distinguishing the case from that presented in *Cliff v. United States*, 195 U. S. 159, as we understand the facts there reported—the questions of law concerning which this court desires the instruction and advice of the Supreme Court, are these:

First. With the oleomargarine caused "to look like butter," by the use of natural palm oil as one of the ingredients—"a pure vegetable oil," named in the statute as an ingredient of oleomargarine—which not only gives the coloration sought for the finished product, but otherwise (in some degree) improves the texture, quality and healthfulness of the oleomargarine. Can such use be denominated "artificial coloration," within the terms and meaning of the statute referred to, fixing the rate of taxation?

Second. For the purpose of assessing the statutory tax on the oleomargarine described in the first question, Is the rate of
4 taxation dependent, either (1) upon the ratio which the quantity of palm oil used bears to the other ingredients, or (2) the extent or ratio of other benefits than that of coloration given by the palm oil?

Third. Can the fact that the manufacturer intended and used the palm oil for coloration of the oleomargarine enter into the determination of the amount taxable under the statute?

FRANCIS E. BAKER,
WILLIAM H. SEAMAN,
C. C. KOHLSAAT,
Circuit Judges.

Chicago, March 17th, 1909.

5 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 4, inclusive, are the questions certified to the Supreme Court of the United States in the case of William J. Moxley, a Corporation organized and existing under the Laws of the State of Illinois *vs.* Henry L. Hertz, Collector of Internal Revenue for the First Collection District of Illinois, No. 1537, October Term, 1908, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh

Circuit, at the City of Chicago, this seventeenth day of March A. D. 1909.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

Endorsed on cover: File No. 21,571. U. S. circuit court of appeals, 7th circuit. Term No. 775. William J. Moxley, a corporation organized and existing under the laws of the State of Illinois, *vs.* Henry L. Hertz, collector of internal revenue for the first collection district of Illinois. (Certificate.) Filed March 29, 1909. File No. 21,571.

FILED
MAY 14 1909
JAMES H. McKENNEY,

No. [redacted]398.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

WILLIAM J. KOXLEY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF ILLINOIS, PLAINTIFF IN ERROR,

v.

HENRY L. HERTZ, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF ILLINOIS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

WILLIAM J. MOXLEY, A CORPORATION ORganized and existing under the laws of the State of Illinois, plaintiff in error,
v.
HENRY L. HERTZ, COLLECTOR OF INTERNAL revenue for the first collection district of Illinois.

No. 775.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION TO ADVANCE.

The Solicitor-General, on behalf of the defendant in error, respectfully moves the court to advance the above-entitled cause on the docket, for the following reasons:

1. The cause is a suit at law to recover the amount paid to the defendant in error, as collector of internal revenue, under constraint, as the balance, namely $9\frac{3}{4}$ cents per pound (one-fourth cent per pound having been paid previously), of a tax of 10 cents per pound assessed by the Commissioner of Internal Revenue upon 284,998 pounds of oleomargarine manufactured by the plaintiff in error. Issues were joined and, upon written stipulation, were submitted

to the trial court without a jury. After hearing the testimony the trial court made and filed a special finding of facts upon the several issues so submitted, and upon that special finding of facts there was rendered against the plaintiff in error a judgment whereof reversal is sought on writ of error from the United States Circuit Court of Appeals for the Seventh Circuit.

2. The question involved is whether under the provisions of section 8 of the act of Congress approved May 9, 1902 (published as chapter 784, 32 U. S. Stat., 193), said oleomargarine, which was caused to look like butter of a shade of yellow by the use of palm oil, was subject to a tax of 10 cents per pound, or whether, within the meaning of said section 8 of the act of May 9, 1902, said oleomargarine was "free from artificial coloration that caused it to look like butter of any shade of yellow" and was therefore subject to a tax of only one-fourth of 1 cent per pound.

In connection with the decision of the question just stated the case also involves the force and effect of regulations issued by the Commissioner of Internal Revenue under the oleomargarine law and published in regular course by the Treasury Department.

Upon full hearing the United States Circuit Court of Appeals for the Seventh Circuit was unable to reach a conclusion without the instruction and advice of the Supreme Court concerning certain questions of law, which are now before this court upon due certificate from said United States Circuit Court of Appeals.

3. After setting forth such part of the special finding of facts as is involved in its inquiry, the United States Circuit Court of Appeals for the Seventh Circuit, in its certificate, says:

> Upon the foregoing facts—distinguishing the case from that presented in *Cliff* v. *United States* (195 U. S., 159), as we understand the facts there reported—the questions of law concerning which this court desires the instruction and advice of the Supreme Court, are these:
>
> First. With the oleomargarine caused "to look like butter" by the use of natural palm oil as one of the ingredients "a pure vegetable oil," named in the statute as an ingredient of oleomargarine, which not only gives the coloration sought for the finished product, but otherwise (in some degree) improves the texture, quality, and healthfulness of the oleomargarine, can such use be denominated "artificial coloration" within the terms and meaning of the statute referred to, fixing the rate of taxation?
>
> Second. For the purpose of assessing the statutory tax on the oleomargarine described in the first question, is the rate of taxation dependent either (1) upon the ratio which the quantity of palm oil used bears to the other ingredients, or (2) the extent or ratio of other benefits than that of coloration given by the palm oil?
>
> Third. Can the fact that the manufacturer intended and used the palm oil for coloration of the oleomargarine enter into the determination of the amount taxable under the statute?

4. Meanwhile, and until this cause shall have been decided, neither the manufacturer of oleomargarine nor the United States internal-revenue officers can determine whether oleomargarine like that made by the plaintiff is lawfully subject to the tax of 10 cents per pound or to the tax of one-fourth of 1 cent per pound. It is of public importance that this uncertainty as to the amount of the tax to be lawfully assessed and paid upon such oleomargarine should be ended by a decision of this cause at an early day.

5. This case is within rule 26 (paragraph 5) of this court, not only because it is a revenue case but also because it is a case in which the United States is concerned, inasmuch as its speedy determination is essential to a prompt, certain, legal, and just administration of the oleomargarine law by the Bureau of Internal Revenue.

If the court shall advance the case, counsel suggest that the hearing be not earlier than the middle of November next, in view of the large number of government cases already set for the opening of the next term.

I am authorized to state that counsel for plaintiff in error concurs in this motion.

LLOYD W. BOWERS,
Solicitor-General.

MAY, 1909.

O

FILED
DEC 8 1909
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1909.

No. 398

WM. J. BOKLET, a Corporation, etc., *Plaintiff in Error,*
vs.
HENRY L. HERTZ, Collector of Internal Revenue for the First Collection District of Illinois, *Defendant in Error.*

On a certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN MAYNARD HARLAN,
Attorney for Plaintiff in Error.

BYRON-WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1909.

No. 398

WM. J. MOXLEY, a Corporation, etc., *Plaintiff in Error*, vs. **HENRY L. HERTZ**, Collector of Internal Revenue for the First Collection District of Illinois, *Defendant in Error.*	On a certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

STATEMENT.

This case comes to this Court upon a certificate from the United States Circuit Court of Appeals for the Seventh Circuit, submitting three questions of law concerning which that court desires the instruction and advice of this court.

A brief preliminary statement of the nature and course of the case will suffice, and may be of service.

Plaintiff in error had manufactured, under due authority to engage in such business, 284,998 pounds

of oleomargarine, which palm oil, used therein, caused to "look like butter of a shade of yellow," and had sold said oleomargarine, after paying United States Internal Revenue tax thereon at the rate of ¼ of a cent per pound. Subsequently the Commissioner of Internal Revenue levied against plaintiff in error, and the latter paid under protest to defendant in error, Hertz, Collector, upon his demand, an assessment of 9¾ cents per pound as the balance of a tax of 10 cents per pound. Plaintiff in error brought this suit to recover the amount of that assessment with interest.

The disputed assessment made by the Commissioner of Internal Revenue purported to be pursuant to Sec. 8 of the Act of Congress, approved May 9, 1902, published as Chap. 784, 32 U. S. Stat. at L., 193; and the validity of that assessment therefore depends upon the interpretation of that statutory provision. The pertinent part of that section is as follows:

> "Sec. 8: That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of 10 cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *provided, when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound.*"

After hearing voluminous testimony, the trial court (Judge Grosscup), a jury having been duly waived, made *a special finding* of facts, and upon that special finding entered against the plaintiff in

error a judgment, whereof reversal was sought on writ of error from the Circuit Court of Appeals. Plaintiff in error made no attempt in the Court of Appeals to go behind the special finding of facts; but the sole question presented under the assignment of errors was whether, *upon the trial court's special finding of facts*, judgment should be for the plaintiff or for the defendant.

The government, contending that the decision of this court in *Cliff* v. *United States*, 195 U. S., 159, precludes the possibility of a recovery by plaintiff in error herein, the Circuit Court of Appeals—after setting forth that portion of the special finding of facts which, the members of that court unanimously considered, distinguishes the case at bar from the *Cliff* case—certified to this Court three questions of law, upon which the Court of Appeals desires the instruction and advice of the Supreme Court. Those questions are as follows:

> "First. With the oleomargarine caused 'to look like butter', by the use of natural palm oil as one of the ingredients—'a pure vegetable oil', named in the statute as an ingredient of oleomargarine—which not only gives the coloration sought for the finished product, but otherwise (in some degree) improves the texture, quality and healthfulness of the oleomargarine, Can such use be denominated 'artificial coloration', within the terms and meaning of the statute referred to, fixing the rate of taxation?
>
> "Second. For the purpose of assessing the statutory tax on the oleomargarine described in the first question, Is the rate of taxation dependent, either (1) upon the ratio which the quantity of palm oil used bears to the other ingredients, or (2) the extent or ratio of other

benefits than that of coloration given by the palm oil?

"Third. Can the fact that the manufacturer intended and used the palm oil for coloration of the oleomargarine enter into the determination of the amount taxable under the statute?"

That portion of the special finding of facts which is set forth by the Court of Appeals in its certificate as being involved in the questions submitted to this Court and as distinguishing the case at bar from the *Cliff* case, is as follows:

"(1) That in June, 1902, after the above mentioned enactment, the Commissioner of Internal Revenue officially promulgated and published and issued in regular course by the United States Treasury Department, the regulation as to 'artificial coloration' in language as follows:

" '**Regulation as to Artificial Coloration.**

" 'If in the production of oleomargarine the mixtures of compounds set out in the law of 1886 are used, and these compounds are all free from artificial coloration and no artificial coloration is produced by the addition of coloring matter as an independent and separate ingredient, a tax of one-fourth of 1 cent per pound only will be collected, although the finished product may look like butter of some shade of yellow. For example, if butter that has been artificially colored is used as a component part of the finished product oleomargarine (and that finished product looks like butter of any shade of yellow) as the oleomargarine is not free from artificial coloration the tax of 10 cents per pound will be assessed and collected. *But if* butter absolutely free from artificial coloration or cotton-seed oil free from artificial coloration, or *any other of the mixtures or compounds legally used in the manufacture of the finished*

product oleomargarine has naturally a shade of yellow in no way produced by artificial coloration, and through the use of one or more *of these unartificially-colored legal component parts of oleomargarine the finished product should look like butter of any shade of yellow, this product will be subject to a tax of only one-fourth of 1 cent per pound*, as it is absolutely free from artificial coloration that has caused it to look like butter of any shade of yellow.'

"Which said 'Regulation as to Artificial Coloration' thenceforth continued to be the regulation of the Commisisoner's office when the oleomargarine hereinafter referred to was made and sold by the plaintiff."

"(2) The rulings and assessments in question by the Commissioner of Internal Revenue were made in 1903.

"(3) The oleomargarine on account of which said assessment was levied by said Commissioner of Internal Revenue and said reduced amount thereof was required by him to be paid by said plaintiff, was composed of oleo-oil, lard, milk, cream, salt, and two vegetable oils commonly known as cotton-seed oil and palm oil, and of nothing else. The proportion of palm oil present in said oleomargarine was about one-half of one per cent. (½%) of the total volume of said oleomargarine.

"**Palm oil is a pure vegetable oil derived from the fruit of palm trees, which grow in certain parts of Africa, and has about the consistence of pure butter. Palm oil consists almost entirely of palmatine and olein, which are the chief constituents of pure butter. Palm oil is perfectly wholesome, is readily digested, and has long been used as an article of food in countries where it is produced. Palm oil was successfully employed in oleomargarine prior to May, 1902; and is a proper constituent of oleomargarine.**

"The oleomargarine involved in this suit looked like butter of a shade of yellow, and such resemblance to butter of a shade of yellow was caused by the presence of the palm oil used in said oleomargarine, and the levy of said assessment by said Commissioner of Internal Revenue was based upon and because of such resemblance to butter of a shade of yellow resulting from such use of palm oil in said oleomargarine. In addition to coloring the oleomargarine in resemblance to butter, the palm oil probably gives to the oleomargarine *slightly better grain or texture*, causing it to act more like butter in the frying pan, and it *also caused* said oleomargarine *to have a better physiological effect upon the persons who ate it;* but such function of the palm oil, other than as coloring matter, was slight, and but for the coloring imparted to the oleomargarine, would not probably have been actually used in its manufacture."

I.

THE FIRST QUESTION OF THE COURT OF APPEALS SHOULD BE ANSWERED IN THE NEGATIVE.

"With the oleomargarine caused 'to look like butter' by the use of natural palm oil as one of the ingredients—'a pure vegetable oil' named in the statute as an ingredient of oleomargarine—which not only gives the coloration sought for the finished product, but otherwise (in some degree) improves the texture, quality and healthfulness of the oleomargarine," such use cannot "be denominated 'artificial coloration' within the terms and meaning of the statute referred to, fixing the rate of taxation."

The original oleomargarine law, passed by Con-

gress in 1886, imposed a uniform tax of 2 cents per pound on all oleomargarine, regardless of whether it were colored, and regardless of what might have caused its color if it were colored. Such continued to be the tax until May 9, 1902, when Congress, by Sec. 8 of the amendatory act, raised the tax upon oleomargarine to 10 cents per pound, but provided that upon oleomargarine free from artificial coloration "that caused it to look like butter of any shade of yellow" the tax should be only one-fourth of one cent per pound.

"Regulation as to Artificial Coloration."

Soon after the passage of the amendatory act of May 9, 1902, that is, in June, 1902, the Commissioner of Internal Revenue officially promulgated and published the Treasury Department's general "Regulation as to Artificial Coloration," which is set out in full in the statement above. That regulation was an official interpretation and definition of the term "Artificial Coloration," which by the amendatory act was made the touchstone for determining in each case of oleomargarine thereafter manufactured whether it was subject to a tax of 10 cents per pound or of one-fourth of one cent per pound. In other words, if the oleomargarine were *not* free from artificial coloration that causes it to look like butter of any shade of yellow, then a tax of 10 cents per pound must be paid. But if the oleomargarine were free from artificial coloration "that causes it to look like butter of any shade of yellow," then a tax of only one fourth of one cent per

pound must be paid. In that regulation the Commissioner of Internal Revenue said:

> "But if butter absolutely *free from artificial coloration*, or cotton seed oil free from artificial coloration, *or any other of the mixtures or compounds legally used* in the manufacture of the finished product oleomargarine has '*naturally*' a shade of yellow, *in no way produced by artificial coloration*, and through the use of one or more of these *unartificially colored legal component parts* of oleomargarine the finished product should 'look like butter of any shade of yellow,' this product will be subject to a tax of only one-fourth of one cent per pound, as it is absolutely free from artificial coloration that has caused it to 'look like butter of any shade of yellow.' "

In other words, the Commissioner said to manufacturers of oleomargarine, in substance: The statute provides two distinct classes of authorized ingredients of oleomargarine, (1) food ingredients—those having a food value, and not artificially colored, and (2) color ingredients—those having no food value, but only color value. If you use any color ingredient whatever, you must pay the higher tax. If you use only food ingredients, which are free from any coloring except that which belongs naturally to them, you need pay only the lower tax, even although such food ingredients may impart to your product a color like butter of a shade of yellow.

That regulation was in force, as the trial court found, when the oleomargarine involved in the case at bar was manufactured and sold by plaintiff in error.

Clearly, if the first question of the Court of Ap-

peals in this case were to be answered in accordance with the Treasury Department's general "Regulation as to Artificial Coloration," it would be answered in the negative. By the *special finding* of facts *in this case*, palm oil is shown to be "one of these unartificially-colored legal component parts of oleomargarine" referred to in the Department's "Regulation as to Artificial Coloration"; for the trial court found:

"*Palm oil is a pure vegetable oil derived from the fruit of palm trees which grow in certain parts of Africa and has about the consistence of pure butter. Palm oil consists almost entirely of palmatine and olein, which are the chief constituents of pure butter. Palm oil is perfectly wholesome, is readily digested, and has long been used as an article of food in countries where it is produced. Palm oil was successfully employed in oleomargarine prior to May, 1902; and is a proper constituent of oleomargarine.*"

The court also found that palm oil *improves the texture, quality and healthfulness* of the oleomargarine.

The interpretation put upon the statute by the Commissioner in the "Regulation as to Artificial Coloration," promulgated June 2, 1902, is certainly fair and reasonable, consistent with the language of the statute and the purpose for which the statute was enacted.

This interpretation should not be lightly departed from.

As Circuit Judge Woodruff observed, in *United States v. One Thousand Four Hundred and Twelve Gallons of Distilled Spirits*, 10 Blatchf., 428; Fed.

Cas. 15,960; 27 Fed. Cas., 332, 33, in construing a statute involved in that case,

> "it is just to say, that *those who are called upon to conduct their business affairs in view of all its (i. e., the statute's) provisions, ought to be fairly apprised of its requirements*, and of its penalties, of whatever kind * * * and those whose business it is to construe or expound a law which is of doubtful or double meaning, should not incline to the harshest possible meaning, when it is obvious that *those to whom it is to be applied may well have been led to trust in another* which is less severe, but equally satisfying its terms."

The Government's counsel has not heretofore, and, it is presumed, will not now dispute that, when tested by the Department's general "Regulation as to Artificial Coloration" the oleomargarine here involved was free from artificial coloration, and that the assessment paid under protest by plaintiff in error was inconsistent with that general Regulation.

Certainly the plaintiff in error was fully justified in conducting its business in reliance upon that general Regulation and in fixing its selling price upon its product in confidence that no tax would be exacted in excess of one-fourth of a cent per pound on oleomargarine containing only food ingredients unartificially colored.

Nor has any attempt been made to reconcile with fair dealing the action of the Government in requiring the payment of the tax of 10 cents per pound upon oleomargarine, which, when made and sold, was, under the Department's general Regulation interpreting Section 8 of the amendatory Act of 1902, "free from artificial coloration" and therefore sub-

ject only to the tax of one fourth of one cent per pound, which plaintiff in error had paid.

On the contrary, the Government's counsel heretofore has ignored entirely the Department's general "Regulation as to Artificial Coloration," and the only conceivable explanation of counsel's attitude in that regard is that counsel have considered that that Regulation was invalidated by the *Cliff* case.

It seems important therefore to inquire at the outset what precisely was the issue in that case; for its authority *cannot extend beyond the issue involved and decided* in it even though some general language used in the opinion, when taken by itself apart from the issue involved, may be thought susceptible of an interpretation giving to the opinion wider effect than was required to determine the issue involved. And the fact that that case was one of first impression, that three members of this Court dissented and that the case has not been reviewed or cited by this Court in any later case emphasizes the propriety and need of confining the authority of that case closely to the issue involved and decided in it. Moreover, failure so to confine the authority of the *Cliff* case would bring that case into collision with the case of *McCray* v. *United States*, 195 U. S., 27, which was argued simultaneously with the *Cliff* case by the same counsel and is reported in the same volume.

Prefacing the discussion of the *Cliff* case, the writer deems it proper to say that while he was permitted to, and did, file a brief in that case in this Court, he had nothing to do with that case in the trial court.

The Cliff Case.

That was a criminal information charging Cliff with having knowingly purchased and received for sale "certain oleomargarine which had not been stamped according to law," it having been stamped as tax paid at only one-fourth of one cent per pound as being free from artificial coloration. One of the ingredients of said oleomargarine was a small quantity of palm oil, which, it was charged, "produced an artificial coloration in the said oleomargarine that caused it to look like butter of a shade of yellow."

This Court prefaced its statement of the Cliff case by quoting Section 2 and part of Section 8 of the Oleomargarine Act, as amended May 9, 1902.

Section 2, which defines oleomargarine for the purposes of the Act, reads:

> "Sec. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

Section 8, above quoted, imposes a tax of ten cents per pound upon oleomargarine, but provides that "*When oleomargarine is free from artificial colora-*

tion that causes it to look like butter of any shade of yellow said tax shall be **one-fourth of one cent per pound."**

It is plain from the opinion of this Court in the *Cliff* case that the *Government's contention* in that case was that the palm oil was "used *solely* for the purpose of producing or imparting a yellow color to the oleomargarine and *therefore* that the oleomargarine so colored" was "not free from artificial coloration and" became "subject to the tax of ten cents per pound."

The defendant *Cliff's contention* is stated by this Court as follows:

> "Now, the contention is that Congress having by section 2 named the possible ingredients of oleomargarine, the coloring given to a compound of some or all by the use of one of the named ingredients is a natural coloring, and not an artificial coloration subjecting to a tax of ten cents per pound. In order that the precise contention may be understood we quote the following from one of the briefs filed for plaintiff in error:
>
> 'By parity of reasoning, when one is speaking of oleomargarine, *natural* coloration means a coloration due to a *natural* ingredient of oleomargarine, and to find out whether a certain ingredient is a natural ingredient of oleomargarine, we turn to the statute which defines the *nature* of oleomargarine. If the color giving ingredient be a *natural*, that is a *statutory* ingredient of oleomargarine, then how can it be truly said that the color caused by such ingredient is "artificial coloration" merely because the quantity of such ingredient used is small or even minute, and the purpose of its use is to impart the desired color?

> Howsoever minute may be the quantity of palm oil used, it is none the less a vegetable oil, a *statutory*, or, so to speak, a *natural* ingredient of oleomargarine, and displaces in the finished product an equal volume of some other statutory ingredient of oleomargarine, as, for instance, cotton-seed oil. The statute confers no power upon the Commissioner to prescribe the formula for the manufacture of oleomargarine, or the proportion of the different ingredients, or to exclude any ingredient except upon the ground of its being deleterious to health. But does not the government, in effect, assume such power to be in the Commissioner when by reason of his arbitrary classification, based upon the *quantity* of palm oil used, it requires a tax of ten cents per pound upon oleomargarine containing a small or minute proportion of palm oil, while if the percentage used of that oil were large enough to constitute what the Commisisoner would regard as a substantial part of the finished product it is conceded that the tax would be only one fourth of a cent per pound.' "

In the *Cliff* case the defendant neglected to show, as he might have, what are found as facts in this case, namely: that palm oil in its nature is suitable for food; that, for many years prior to 1902, it had been used for food and that, when so used, it was found healthful and digestible; and that palm oil had been successfully used in oleomargarine *prior to May* 9, 1902, the date of the passage of the amendment which for the first time made the tax upon oleomargarine that *is free* from artificial coloration smaller than the tax upon oleomargarine that *is not free* from artificial coloration. Prior to May 9, 1902, all oleomargarine was taxed under the original oleomargarine law passed in 1886 at the rate of two

cents per pound, regardless of whether it was free or not free from artificial coloration.

It is thus apparent that the defendant in the *Cliff* case stood upon the narrow proposition, that palm oil being a vegetable oil and, *therefore*, being a statutory ingredient of oleomargarine, it made no difference whether the amount of it used was small or large, or whether the *sole purpose* of its use was to impart the desired color, or whether it, in fact, had any other effect than to give color; coloration due to its use was not, within the meaning of the statute "artificial coloration." In short, *Cliff made no effort whatever to show what, if any, were the effects palm oil had upon the oleomargarine other than giving color to it.* Indeed, by the position he took, as stated by this court, *Cliff*, in effect, admitted for the purpose of that case that the *sole and only* function of the palm oil was to make the oleomargarine "look like butter of a shade of yellow."

In disposing of the issue thus presented the Court said, among other things:

> "It is true that, under the last clause of section 2, oleomargarine includes 'all mixtures and compounds' of the substances named, 'made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter' and that palm oil is a vegetable oil, one of those substances. But in this enumeration Congress included not only those 'substances which, entering into the composition of oleomargarine, *make it suitable for food*, and, so to speak, form its body, but also others used only for coloring. After naming some it adds specifically 'and other coloring matter.' The purpose in so including 'coloring matter' is obvious. It was to prevent excluding from

the operation of the statute anything in its nature oleomargarine by the addition of a substance not in reality an ingredient but serving substantially only the purpose of coloring the product to cause it to look like butter. *The fact* that one of the ingredients of this compound is palm oil *does not show* that such oil *does anything else than color* the product composed of other ingredients, and if it does substantially only this it is rightfully styled an artificial coloration. * * * It must be held that when any substance, although named as a possible ingredient of oleomargarine substantially serves *only the function of coloring* the mass, and so as to cause the product to 'look like butter of any shade of yellow' it is an artificial coloration.

Whether the Commisisoner of Internal Revenue has all the authority which is in terms committed to him by section 14 need not be determined. The letter containing his ruling *was admitted in evidence without objection.* Irrespective of such ruling and upon the other testimony the judge who tried the case and whose decision must be considered equivalent to the verdict of a jury could rightfully have found that this package of oleomargarine was artificially colored by the small amount of palm oil used in its manufacture." * * *

"The verdict of a jury *is conclusive upon a question of fact* unless plainly against the evidence. *The same weight*, as we have said, *must be given to the finding of a court*, and upon testimony *received without objection* a finding that this palm oil served substantially only to color the product cannot be disturbed."

It is thus apparent that the *Cliff* case does not overrule the interpretation placed upon the statute by the Commissioner in the Regulation of June, 1902, but is entirely consistent with it. In the *Cliff* case, the

Court in effect upheld the Commissioner's interpretation, but, by reason of the failure of Cliff to show that palm oil had a food value, the Court classified palm oil as a statutory "color ingredient" and not a statutory "food ingredient" of oleomargarine.

The fact distinguishing the *Cliff* case from the case at bar is just this: that the plaintiff in error herein has proved, and the trial court has found, palm oil to be a food ingredient of oleomargarine, while in the *Cliff* case it was conceded, in effect, that palm oil was merely a color ingredient.

In the case at bar, the trial court *found* among other *facts*, from the evidence, as follows:

> "Palm oil is a pure vegetable oil derived from the fruit of palm trees, which grow in certain parts of Africa, and has *about the consistence of pure butter. Palm oil consists almost entirely of palmatine and olein, which are the chief constituents of pure butter. Palm oil is perfectly wholesome, is readily digested, and has long been used as an article of food in countries where it is produced. Palm oil was successfully employed in oleomargarine prior to May, 1902; and is a proper constituent of oleomargarine.*
>
> * * * * *
>
> *In addition to coloring the oleomargarine in resemblance to butter, the palm oil probably gives to the oleomargarine slightly better grain or texture, causing it to act more like butter in the frying pan, and it also caused said oleomargarine to have a better physiological effect upon the persons who ate it.*"

It would be entirely consistent with this Court's decision of the issue actually involved in the *Cliff* case to hold that *where it appears*, as it does by the

special finding of facts in this case, that palm oil "is perfectly wholesome, is readily digested and has long been used as an article of food," that it "was successfully employed in oleomargarine *prior to May*, 1902, and *is a proper constituent of oleomargarine*," and that, besides giving color "like butter of a shade of yellow" it "*improves the texture, quality and healthfulness* of the oleomargarine," the color imparted by its use *is not artificial coloration*. And since it would be consistent with the *Cliff* case so to hold, *that case* presents no reason why this Court in this case should not so hold and accordingly answer the first question of the Court of Appeals in the negative. In view of the actual issue in the *Cliff* case, which was tried by the court (Judge Kohlsaat) without a jury, the general finding of the trial court against the defendant amounted *to a specific finding upon the evidence in the Cliff case* that the palm oil used *served only to color the product*. That finding of fact this Court held could not be disturbed, but must be treated by it as conclusive for the purpose of the decision *of that case*.

On the other hand, *the special finding of facts in this case* is explicit as to the nature of palm oil and shows that palm oil was successfully employed in oleomargarine prior to May 9, 1902, and that when used in oleomargarine it served useful and healthful functions other than merely to give color to the finished product.

The *Cliff* case therefore certainly does not militate against the position of plaintiff in error *in this case*.

The McCray and Cliff Cases.

Now let us briefly look at the *McCray* case and the *Cliff* case with reference to their bearing upon each other and upon the first question certified to this Court in this case.

In the *McCray* case, this Court held that yellow color due to the use of an *authorized food ingredient*, not itself artificially colored, *was not artificial coloration*, but that yellow color due to the use of an artificially colored, though authorized, food ingredient (in that case, artificially colored butter), was artificial coloration. At page 48 of the opinion in that case the Supreme Court said:

> "As the benefit of the lower tax depended upon the absence from the manufactured product of artificial coloration, it follows that, if in the manufacture an authorized ingredient *which was artificially colored* was used so as to artificially color the product, whilst that product would be oleomargarine it could *not* be oleomargarine free from artificial coloration within the intendment of the proviso."

But the Court then went on to say that the amendment made by striking out the word "*ingredient*" in the proviso of section 8 of the act of May 9, 1902,

> "operated simply to render it certain that the finished product, *even although of a yellow color*, would be within the proviso [that is *taxable only at one-fourth of a cent per pound*] where the color was imparted by an *authorized ingredient not artificially colored.*"

In the *Cliff* case, however, the situation was different. The Government's contention there was that

the palm oil was "used *solely* for the purpose of producing or imparting a yellow color to the oleomargarine and *therefore* [that is, because, so far as appeared in that case, *such* was the *sole* purpose of using palm oil] that the oleomargarine so colored" was "not free from artificial coloration" and hence was "subject to the tax of ten cents per pound." (195 U. S., 161-2.) *Cliff* did not dispute, for the purposes of that case, the *alleged* fact that the *sole* purpose of the palm oil was to impart color, but based his defense entirely on the narrow proposition that, as a matter of law, palm oil, *merely because it was a vegetable oil*, was an *authorized ingredient* of oleomargarine and that *therefore* (because it was an authorized ingredient) even if its sole function were that of imparting color, the resemblance to butter of a shade of yellow, due to the use of palm oil *was not artificial coloration*.

Stated in the form of a syllogism, Cliff's defense was this:

First premise: Color due to the use of an *authorized food ingredient*, not artificially colored, is not artificial coloration. (*McCray* case.)

Second premise: Palm oil, being a vegetable oil, not artificially colored, is an *authorized* ingredient.

Conclusion: Therefore color due to the use of palm oil *is not artificial coloration*.

This Court, in passing upon *Cliff's* contention did not gainsay the first premise in *Cliff's* syllogism—that had been settled by the *McCray* case,—but it did hold Cliff's second premise to be invalid and thereby upset his conclusion—that is, his defense.

That is, this Court, in harmony with the Department's "Regulation as to Artificial Coloration," and with the *McCray* case, held in effect that statutory ingredients of oleomargarine were of two kinds: (1) food ingredients, or ingredients having a food value and which make oleomargarine suitable for food; (2) color ingredients—those which are themselves artificially colored or which *serve only to color* the oleomargarine and *have no other function*.

In other words, to have been valid the second premise in the above syllogism must have assigned food value as well as statutory authorization, as an attribute of palm oil.

The criterion thus indicated by the Supreme Court in the *Cliff* case for determining whether a vegetable oil, *palm oil for example*, which imparts to oleomargarine a color like butter of a shade of yellow is artificial coloration is the fact whether or not such vegetable oil is *suitable for food and makes oleomargarine suitable for food*. If such vegetable oil is *suitable for food and makes oleomargarine suitable for food*, then such vegetable oil is an authorized ingredient and it not being itself artificially colored, the color due to its use *is not artificial coloration* and the oleomargarine so colored by it, is within the proviso of section 8 of the act of May 9, 1902, and is subject only to the tax of **one-fourth of a cent per pound**.

For aught that appeared in the *Cliff* case, palm oil might have had no food value whatever, indeed even might have been deleterious to health and *might* have rendered the oleomargarine in which it was used *wholly unsuitable for food*.

Now apply the test, laid down in the *Cliff* case, to the case at bar.

In this case it appears *affirmatively* that palm oil is *suitable for food and is a proper constituent of oleomargarine*, as shown by the special finding of the trial court as follows:

> "*Palm oil is a pure vegetable oil derived from the fruit of palm trees, which grow in certain parts of Africa, and has about the consistence of pure butter. Palm oil consists almost entirely of palmatine and olein, which are the chief constituents of pure butter. Palm oil is perfectly wholesome, is readily digested, and has long been used as an article of food in countries where it is produced. Palm oil was successfully employed in oleomargarine prior to May, 1902, and is a proper constituent of oleomargarine.*"

And it appears that palm oil *does make oleomargarine suitable for food*, as shown by the following special findings of fact:

> "*In addition to coloring the oleomargarine in resemblance to butter, the palm oil probably gives to the oleomargarine slightly better grain or texture causing it to act more like butter in the frying pan*, AND IT ALSO CAUSED SAID OLEOMARGARINE TO HAVE A BETTER PHYSIOLOGICAL EFFECT UPON THE PERSONS WHO ATE IT."

In other words, that which did *not* appear at all in the *Cliff* case *does appear affirmatively* in the case at bar, namely, that palm oil is *suitable for food and does make oleomargarine suitable for food*, and that among other things it makes the oleomargarine, of which it is an ingredient, more *healthful*. Therefore, by the very criterion laid down in the *Cliff* case, palm oil is an *authorized food ingredient* of oleomargarine and *therefore* (because it is an *authorized*

food ingredient), under the ruling of the *McCray case*, color due to its use *is not artificial coloration*. Thus under the *McCray* and *Cliff* cases, plainly harmonized and rationally applied, we have, as the basis of the claim of the plaintiff in error that the first question of the Court of Appeals should be answered in the negative, the following syllogism:

First premise: Color due to the use of an *authorized* food ingredient, not artificially colored, *is not artificial coloration* (*McCray* case).

Second premise: Palm oil, being a vegetable oil, *suitable for food* and its nature such as to *make oleomargarine suitable for food*, and being itself not artificially colored, *is an authorized food ingredient*. (*Cliff* case.)

Conclusion: Therefore color due to the use of palm oil *is not artificial coloration*.

II.

THE SECOND QUESTION OF THE COURT OF APPEALS SHOULD BE ANSWERED IN THE NEGATIVE.

"For the purpose of assessing the statutory tax on the oleomargarine described in the first question," the rate of taxation is not "dependent, either (1) upon the ratio which the quantity of palm oil used bears to the other ingredients, or (2) the extent or ratio of other benefits than that of coloration given by the palm oil."

Nowhere in the oleomargarine act, either as enacted in 1886 or as thereafter amended, is there a word to indicate that Congress intended that the

incidence or the amount of the tax on oleomargarine should depend upon the ratio of the several ingredients respecting either the quantity used in, or the benefits resulting to, the oleomargarine. Nor is any power conferred upon the Commissioner of Internal Revenue to prescribe any formula for use by manufacturers or to control in any manner the composition of the oleomargarine except to the extent of preventing the use of any material or compound deleterious to health.

Moreover, in making "artificial coloration" the touchstone for determining whether particular oleomargarine is to be taxed at ten cents or at one-fourth of a cent per pound Congress used no language suggesting that the question whether coloration were or were not "artificial" would depend at all upon what quantity was used of the material producing the coloration, or upon the extent or ratio of other benefits than that of coloration given by an authorized ingredient which is suitable for food and contributes to the suitability of oleomargarine for food. It is not the quantity of a particular color-giving substance used in a specific case, but it is rather *the inherent nature of the substance itself* and its effects and functions in the oleomargarine that determine whether the coloration caused by it is "artificial coloration." If inherently the substance is a natural fat or oil *suitable for food* and its nature such as to make oleomargarine suitable for food, it is an authorized ingredient of oleomargarine under the rule prescribed in the *Cliff* case, and color due to its use in oleomargarine does not become artificial coloration

merely because the quantity used is small. And oleomargarine composed exclusively of authorized food ingredients not artificially colored is subject (as held in the *McCray* case) only to the tax of one-fourth of a cent per pound, even though such oleomargarine "look like butter of any shade of yellow" and regardless of the quantity used of any particular authorized food ingredient not artificially colored, that may be used to impart the color and regardless of the extent or ratio of other benefits contributed by such color-giving food ingredient.

To use this Court's language in the *McCray* case, it is "certain that the finished product, *even although of a yellow color*, would be within the proviso (that is, taxable only at one-fourth of a cent per pound) where the color was imparted by an authorized ingredient not artificially colored."

The ingredients of the oleomargarine involved in this case are definitely and specifically enumerated in the finding of facts, and the brief and explicit statement by this Court in the *McCray* case, above quoted, makes it a simple matter to determine whether a product of these known ingredients, looking "like butter of any shade of yellow," is subject to the tax of ten cents or to the tax of one fourth of a cent per pound.

Was the color "imparted by an authorized ingredient not artificially colored"? If so, then the oleomargarine is "free from artificial coloration" and the tax is one-fourth of a cent per pound. Otherwise the tax is ten cents per pound.

In this case it is conceded and found that the re-

semblance to butter of a shade of yellow was due to the use of a small amount of palm oil in the oleomargarine. It is likewise conceded that the *natural* color of palm oil is orange-yellow. In other words, the color in palm oil belongs to the oil and has no existence separate and apart from the oil.

The only question in this case, therefore, is this: Is palm oil an "*authorized food ingredient*" of oleomargarine?

The answer to this question, in view of the *Cliff* case, depends upon the answer to another question, namely, whether (borrowing the language of this Court in that case) palm oil "is suitable for" food, whether it "does anything else," "serves any other function," in oleomargarine than to give color. These questions were answered upon the evidence *in the Cliff case* in the negative by the court's general finding of the defendant guilty. *In the case at bar*, on the other hand, this latter question has been answered in the affirmative by the court's special finding as follows:

> "Palm oil is a pure vegetable oil derived from the fruit of palm trees, which grow in certain parts of Africa, and has about the consistency of pure butter. Palm oil consists almost entirely of palmatine and olein, which are the chief constituents of pure butter. *Palm oil is perfectly wholesome, is readily digested*, and has long been used as an article of food in countries where it is produced. *Palm oil was successfully employed in oleomargarine prior to May, 1902; and is a proper constituent of oleomargarine.* * * * *In addition to coloring the oleomargarine in resemblance to butter, the palm oil probably gives to the oleomargarine slightly*

better grain or texture, causing it to act more like butter in the frying pan, and it also caused said oleomargarine to have a better physiological effect on the persons who ate it."

The meaning of the term "artificial coloration," as used in the act, apparently seemed at one time just as simple and clear to the Commissioner of Internal Revenue as it did to the Supreme Court in the *McCray* case. No more clear exposition of that phrase could be desired than that which the trial court found was officially published by the Commissioner of Internal Revenue in regular course, in June, 1902, shortly after the passage of the amendatory act (May 9, 1902), and was in force when the oleomargarine in this case involved was made and sold by plaintiff in error. That regulation as to artificial coloration is, for convenience, here in part repeated, as follows:

> REGULATION AS TO ARTIFICIAL COLORATION.
>
> "* * * But if butter absolutely free from *artificial* coloration, or cotton-seed oil free from artificial coloration, or any other of the mixtures or compounds legally used in the manufacture of the finished product oleomargarine has *naturally* a shade of yellow in no way procured by artificial coloration, and through the use of one or more of these unartificially-colored legal component parts of oleomargarine the finished product should look like butter of any shade of yellow, this product will be subject to a tax of only one-fourth of one cent per pound, as it is absolutely free from *artificial* coloration that has caused it to look like butter of any shade of yellow." (Italics are the Commissioner's.)

This "regulation as to artificial coloration" construes the term "artificial coloration" precisely as

the Supreme Court construed it in the *McCray* case and precisely also as the writer contends it should be construed in this case; for it is admitted that vegetable oils are "legally used in the manufacture of the finished product oleomargarine" and are "legal component parts of oleomargarine"; that palm oil is vegetable oil, and that palm oil "has *naturally* a shade of yellow in no way procured by artificial coloration."

With what reason, then, can it be held that this "shade of yellow," which palm oil "naturally" has, becomes "artificial coloration" when imparted by the palm oil to oleomargarine?

It will undoubtedly be contended by counsel for the Government that in the case at bar palm oil cannot be regarded as a statutory "food ingredient," as distinguished from a statutory "color ingredient," because of the small percentage of palm oil used by the plaintiff in error in manufacturing the oleomargarine here involved.

This Court's opinion in the *Cliff* case shows, however, that its decision in the *Cliff* case was predicated not upon the smallness of the amount of palm oil used, *but upon the conclusive general finding of the lower court* which, in view of the issue there made by the parties, amounted to a specific finding *in that case* that the palm oil "did nothing else," "served no other function" than to give color. *Cliff* conceded in his case, for the purpose of argument, that the palm oil used in the oleomargarine sold by him served no other function than to color his product, and neither offered proof nor made claim to the contrary.

If the Government's contention in this case were sound, the honest manufacturer, guided by the wisest counsel, and desiring to manufacture oleomargarine subject only to the one-fourth of a cent tax, could not foretell, if he used palm oil, whether his oleomargarine would be subject to a tax of ten cents or of one-fourth of a cent per pound. Moreover, if the Government's assessment involved in this case were upheld in face of the fact that under the terms of the general "Regulation as to Artificial Coloration" plaintiff in error's oleomargarine was subject only to a tax of one-fourth of a cent per pound, then the result must be entire indefiniteness and uncertainty as to the amount of the tax the manufacturer must pay. Just where the line might be drawn between a *large* percentage and a *small* percentage of palm oil has not been suggested. For, if the present Commissioner were to rule that oleomargarine hereafter made containing, say, 5 per cent. of palm oil, was subject only to the one-fourth of a cent tax because that quantity of palm oil was in his opinion *large* and the resulting coloration therefore not "artificial," his successor in office might regard that quantity of palm oil as *small* and might forthwith proceed to make an assessment for unpaid tax to the amount of nine and three-fourths cents per pound, and in such case the manufacturer would have no legal defense against the assessment, if the Government's contention herein be upheld.

Notwithstanding the general "Regulation as to Artificial Coloration" as set out in the special finding in this case, the Commissioner of Internal Revenue,

seems to hold that coloration in oleomargarine is "artificial" when caused even by an authorized unartificially-colored food ingredient, that is, a natural fat or oil, "suitable for food" and of a nature to make oleomargarine suitable for food, if such authorized food ingredient is used in such *small* quantity as to suggest the *inference* that it was used solely for the *purpose* of imparting a yellow color to the finished product; but that, if what the Commissioner should regard as a *large* quantity of the same food ingredient were substituted for a like volume of any other authorized food ingredient hitherto used (as, for instance, cotton-seed oil) and the *avowed* purpose of the substitution were thus to impart coloration to the finished product, the resulting coloration would not be "artificial." That is to say, an intent to color which is *inferred* from the use of what may be regarded by the Commissioner as a *small* percentage of palm oil makes the coloration "artificial" and subjects the oleomargarine to a tax of ten cents per pound, but an *avowed* intent to color by the use of what might be regarded as a *large* percentage of palm oil in lieu of a like volume of any other statutory food ingredient does not make the coloration "artificial," and subjects the oleomargarine to a tax of only one-fourth of a cent per pound, because the palm oil would in that case form a large part of the volume or body of the product.

Can it be that Congress ever intended that the amount of the tax—that is, whether ten cents or one-fourth of a cent per pound—to be paid on oleomargarine should depend upon whether the quantity

used of the material which causes the resemblance to butter of a shade of yellow were regarded by the Commissioner of Internal Revenue or by a jury or a court as a *small* or a *large* percentage of the volume of the finished product? If Congress had so intended, would it not have specified the percentage that must be used of any color-giving food ingredient in order that the manufacturer should not lose the benefit of the lower tax if he desired to make oleomargarine that would be subject only to the lower tax, and in order that he might not unwittingly expose himself to punishment for violation of the law? Did not Congress intend that the amount of the tax per pound should depend upon the *nature of and the functions served by*, the material the use of which causes the oleomargarine "to look like butter of any shade of yellow"? Does the word "artificial" as used in the act *refer to an uncertain quantity* of a color-giving ingredient to be fixed only in the individual discretion of the Commissioner for the time being or by the verdict of a jury or the finding of a court?

Is it not more reasonable to hold that the word "artificial" refers to the *nature* and the function of the material which imparts to oleomargarine a resemblance to butter of a shade of yellow, so that the manufacturer may proceed in his business *with definite certainty as to the amount of tax to be paid upon his finished product?*

III.

THE THIRD QUESTION OF THE COURT OF APPEALS SHOULD BE ANSWERED IN THE NEGATIVE.

"The fact that the manufacturer intended and used the palm oil for the coloration of the oleomargarine" cannot "enter into the determination of the amount taxable under the statute."

This proposition seems to be so plain as not to require argument in its support. Taxes are laid upon *things, not upon motives.* But it may be helpful nevertheless to refer to certain cases decided by this Court.

In *Merritt* v. *Welsh*, 104 U. S., 694, it was held that the Treasury Department had no discretion but to classify the quality of sugar according to its color, although the color test had become entirely inadequate and although the color of the lower class was imparted in manufacture to the higher class *for the very purpose of evading the higher tax.* Speaking by Mr. Justice Bradley, the court said (p. 701):

> "The color standard has come to be a precarious one. Still, if the Government chooses to adhere to it, it is bound by it. If Congress, as it has done, adopted the color standard, it is not for the customs department to adopt a different one. When Congress chooses to do this, it will be time enough for the custom-house to follow. As before said, Congress alone has the power to lay taxes and duties.
>
> Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer a right to make his goods as he pleases? If they are less marketable, it is his

loss; if they are not less marketable, who has a right to complain? If the duties are affected, there is a plain remedy. Congress can always adopt such laws and regulations as it may deem expedient for protecting the interests of the Government. If, in the case under consideration, a color standard is insufficient, a different one is ready at hand,—that of the polariscope, or other chemical test. *If the quantity of saccharine matter in sugar, or its state of advancement from the raw state to a condition of refinement, is desirable as a dutiable standard, let it be so declared by the laws; and then the merchant will know on what he has to depend.* UNCERTAINTY AND AMBIGUITY ARE THE BANE OF COMMERCE. DISCRETION IN THE CUSTOM-HOUSE OFFICER SHOULD BE LIMITED AS STRICTLY AS POSSIBLE. *It has been said with much truth, 'where law ends tyranny begins.'*"

And again (p. 704):

"If experience shows that Congress acted under a mistaken impression, that does not authorize the Treasury Department, or the courts, *to take the part of legislative guardians*, and by construction, to make new laws which they imagine Congress would have made had it been properly informed, but which Congress itself, on being properly informed, has not, as yet, seen fit to make. It may be that our tariff of duties is evaded by giving to sugars, in the process of manufacture, a low grade of color. If this be so, *it is no more than every manufacturer does; namely, so to manufacture his goods as to avoid the burden of high duties, provided he can do it without injuring their marketability, or injuring it less than the duties involved.* So long as no deception is practiced, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred. Heretofore, it has been thought desirable, in order to make sugars more marketable, to use artificial proces-

ses for bleaching them. The percolation of clay water through the mass was one of the means adopted. The sprinkling of refined syrups in the form of spray on the sugar in the centrifugals is another. If the manufacturer uses these bleaching processes in order to make his sugars more salable, why may he not omit to do so in order to render them less dutiable; nay, why may he not employ an extra quantity of molasses for that purpose? If after the sugars are manufactured, especially after being put up in packages, coloring matter is artificially imposed, it might be a different matter."

In *Seeberger* v. *Farwell*, 139 U. S., 608, it was expressly held that the introduction of a few cotton threads into the woolen cloth *for the very purpose of having it classed as part wool goods*, and *thus to evade a higher duty* laid on woolen goods, would prevent the collector from classifying the goods as woolen.

This Court, by Blatchford, J., referred to the proceedings below in the Circuit Court for the Northern District of Illinois and approved the reasoning of the opinion of that court, saying (p. 610):

"The court, in its opinion, said that the collector, in classifying the goods, evidently assumed that the purpose of mixing the cotton with the wool was to secure a low classification, *and assumed that so small a quantity of cotton would not* MATERIALLY *change the character of the goods as merchandise, when offered for sale to consumers, and, therefore, looked upon the contention of the plaintiffs for a lower classification as an attempt to defraud the revenue, and accordingly imposed the higher duty;* that, Congress having made special provision for a lower rate of duty upon goods when composed in part of wool **without naming how much of other material should enter into their composition in**

order to secure such lower rate of duty, the court was of the opinion that manufacturers and importers *had the right to adjust themselves to the foregoing clause of the tariff, and to manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate;* that, although the goods in question contained *so small an amount of cotton* that the ordinary dealer in them and the ordinary examiner would not detect the cotton without a close and careful examination, that did not change the legal right of the plaintiffs to bring their goods within the operation of the clause involved, by the admixture of *even a small percentage* of cotton, if they could do so, and that goods made of 94 per cent. in bulk of wool and 6 per cent. in bulk of cotton fairly came within the description of goods composed in part of wool.

We concur in this view, and the judgment is affirmed."

This decision was followed in *Magone* v. *Luckemeyer*, 139 U. S., 612.

We wish especially to invite the Court's attention to the language of the opinion in the case last considered in its application to the case at bar. In the *Seeberger* case, the contention of the Collector was that "so small a quantity of cotton would not MATERIALLY change the character of the goods."

In the case at bar, the Government's contention is that the amount of palm oil used is so small as to perform no substantial function other than merely to give color.

This Court in the *Seeberger* case held that, "Congress having made special provision for a lower rate of duty upon goods when composed in part of wool without naming *how much* of other material should

enter into the composition." manufacturers "had the right to adjust themselves" to the provisions of the tariff act and *having lawfully done so* their goods would be subject *only* to the *lower rate of duty.*

It is thus apparent that this Court in the *Seeberger* case, the issue being squarely presented, declined to adopt the quantitative test for the reason, as stated by the Court, that Congress had made "special provision for a lower rate * * * without naming *how much* of the other material should enter into their composition in order to secure such lower rate of duty." That is, this Court declined to undertake to *legislate* on a subject upon which Congress had not chosen to legislate.

An additional reason which the Court might have advanced as ground for its refusal to adopt the quantitative test is found expressed in the earlier decision of this Court in the *Merritt* case, *supra*, where the Court says:

> "UNCERTAINTY AND AMBIGUITY ARE THE BANE OF COMMERCE. DISCRETION IN THE CUSTOM-HOUSE OFFICIAL SHOULD BE LIMITED AS STRICTLY AS POSSIBLE."

Of the utter "uncertainty" of the so called quantitative test, it is believed sufficient has been already said

The decision in the *Cliff* case is not inconsistent or out of harmony with the decision in the *Seeberger* case. The Supreme Court's opinion in the *Cliff* case was predicated not upon the *smallness* of the amount of palm oil used, *but upon the conclusive general finding of the lower court* which in effect, in view of the issue there made by the parties, amounted to a specific

finding in that case that the palm oil did "nothing else," "served no other function" than to give color.

It follows therefore that the Government in the case at bar is asking this Court to place upon a revenue act a construction which this Court in the *Seeberger* case —a case in which the issue was squarely raised—definitely repudiated when the Government sought to have it applied to a tariff act.

Now let us paraphrase the language used by the Supreme Court in *Seeberger* v. *Farwell*, *supra*, so as to apply it to this case. Congress having made special provision for a lower rate of tax upon oleomargarine when free from artificial coloration without naming how much of a color-giving *authorized* food ingredient should enter into the composition of the oleomargarine in order to secure the lower rate of tax, this Court should hold that manufacturers have the right to adjust themselves to such special provision of the statute, and to manufacture the oleomargarine with only a small percentage of such color-giving *authorized* food ingredient for the purpose of making the oleomargarine taxable at the lower rate.

In *United States* v. *Schoverling*, 146 U. S., 76, 81, it was held, following the *Merritt* case, *supra*, that "the *intent* of the importers, to put the gunstocks with barrels separately imported, so as to make here completed guns for sale, cannot affect the rate of duty on the gunstocks as a separate importation."

In *United States* v. *Irwin*, 78 Fed. Rep., 799, the Circuit Court of Appeals for the Second Circuit, speaking by Circuit Judge Wallace, said (p. 801):

> "Upon the evidence in the record, we entertain no doubt that the importations in controversy

were breech-loading shotguns, which before exportation were in a completed condition, ready for the market or for the sportsman's use, in number equal to that of the stocks or the barrels, but that the parts were detached, shipped in separate cases, and invoiced separately, to enable the importer to enter them as invoiced, escape the payment of the duty upon guns, and, after importation, reassemble the parts. We are to consider to what extent this was a legitimate or a successful effort to avoid the payment of the higher duties.

It is a well-settled doctrine that intent is not an element in determining the proper classification of imported articles, and that merchants are at liberty so to manufacture and so to import their goods as to subject them to the lowest possible duties under the tariff laws."

And again, after referring to some of the decisions of this court (p. 802):

"Applying these principles to the present case, we cannot escape the conclusion that if the articles in controversy were not shotguns, in the condition in which they were imported, they were not dutiable as such, notwithstanding they had been shotguns previously, and could readily be again transformed into shotguns, and notwithstanding they had been taken apart and imported in fragments *merely for the purpose of escaping the duty upon shotguns.*"

CONCLUSION.

In conclusion, it is respectfully submitted that if there be any doubt, under the law, whether plaintiff in error should have been compelled to pay, under protest, a tax at the rate of ten cents per pound on the oleomargarine here in question, this doubt

should be resolved in favor of the plaintiff in error.

It has been shown hereinabove:

(1) That the intent or motive with which a particular element is inserted in a taxed manufacture, does not properly concern the revenue officer.

(2) That the quantity or percentage of a particular element in a taxed manufacture, cannot afford a basis of classification of the manufacture for revenue purposes, unless the taxing statute explicitly fixes a quantitative standard of classification.

(3) That the statutory standard of classification of oleomargarine for revenue purposes *is not quantitative* or fixed with reference to the amount or percentage of any ingredient in the oleomargarine, but *is qualitative* and depends solely upon whether the oleomargarine is composed wholly of "food ingredients" unartificially colored, or in part of "color ingredients" which are without food value.

(4) That the palm oil used by the plaintiff in error herein had a food value and was a proper food ingredient of oleomargarine, and was free from artificial coloration.

With these propositions established, there seems to be hardly room for doubt that plaintiff in error is entitled to recover back all the taxes it was compelled to pay on its oleomargarine, in excess of one-fourth of a cent a pound.

But, if by possibility any doubt could arise, it would have to be resolved in favor of the plaintiff in error.

The oleomargarine law, being a revenue law, should be construed most strongly against the government and in favor of the taxpayer.

Plaintiff in error, having paid the assessment under duress and protest, the burden of establishing clearly its right to the higher tax so assessed and collected rests upon the government precisely as if the government were suing to collect the tax instead of having enforced its payment under protest by threat of summary action.

That the plaintiff in error is entitled to have every doubt that may exist resolved against the liability of plaintiff in error to pay the higher tax, has been frequently announced by the highest authority.

In *United States* v. *Wigglesworth*, 2 Story, 369, Mr. Justice Story, in giving reasons for holding that the revenue act of 1841 did not intend to levy a permanent tax on indigo, said:

> "My reasons for this conclusion are these: In the first place, it is, as I conceive, a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. *In every case, therefore, of doubt* such statutes are construed most strongly against the Government, and in favor of the subjects or citizens, because burdens are not to be imposed or presumed to be imposed, beyond what the statutes expressly and clearly import. *Revenue statutes are in no just sense remedial laws*, or laws founded upon any public policy, *and therefore are not to be liberally construed*. Hence in the present case, if it be a matter of real

> doubt whether the intention of the act of 1841 was to levy a permanent duty on indigo, that doubt would absolve the importer from paying the duty beyond the period when it would otherwise be free."

Hartranft v. *Wiegmann*, 121 U. S., 609, 616, was an action to recover duties alleged to have been illegally exacted. The question in dispute was the classification of certain shells, the plaintiff contending that they were exempt from duty by provision of the free list, while the government asserted that they were subject to a duty of 25 per cent. ad valorem. It was held that the shells were exempt from duty. The Court, speaking by Mr. Justice Blatchford, said:

> "We are of the opinion that the decision of the Circuit Court was correct. But if the question were one of doubt, the doubt would be resolved in favor of the importer 'as duties are never imposed on the citizen upon vague or doubtful interpretation.' (*Powers* v. *Barney*, 5 Blatch., 202; *United States* v. *Isham*, 17 Wall., 496, 504; *Gurr* v. *Scudds*, 11 Exch., 190, 191; *Adams* v. *Bancroft*, 3 Sumn., 384.)"

In *United States* v. *Isham*, 17 Wall., 496, the Court said:

> "If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in *Gurr* v. *Scudds*, 11 Exch., 191, 'a tax cannot be imposed without clear and express words for that purpose.'" citing *Conroy* v. *Warren*, 3 Johns. Cas., 259.

As the practical question involved in the pending issue is really a question of classification, a case specially in point is that of *The American Net & Twine Co.* v. *Worthington, Coll'r.*, 141 U. S., 468. That was a suit to recover excess paid under pro-

test on gilling twine (subject to 25 per cent. duty) which had been classified by the customs officials as linen thread (subject to 40 per cent. duty) and assessed at the higher rate. In sustaining the claim of the importer this Court, by Mr. Justice Brown, said:

> "We think the intention of Congress that these goods should be classified as 'gilling twine' is plain; *but were the question one of doubt*, we should still feel obliged to resolve that doubt in favor of the importer, since the intention of Congress to impose a higher duty should be expressed in clear and unambiguous language."

Citing:

> *United States* v. *Isham*, 17 Wall., 496.
> *Hartranft* v. *Wiegmann*, 121 U. S., 609.
> *Gurr* v. *Scudds*, 11 Exch., 190.

In *Eidman* v. *Martinez*, 184 U. S., 578, a case requiring the construction of the New York inheritance tax law, the Court, speaking by Mr. Justice Brown, said:

> "It is an old and familiar rule of the English courts applicable to all forms of taxation, and *particularly special taxes*, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of exception *confining the operation of the duty*, (*Warrington* v. *Furbor*, 8 East, 242, 247; *Williams* v. *Saugar*, 10 East, 66, 69; *Dean* v. *Diamond*, 4 B. & C., 243, 245; *Tompkins* v. *Ashby*, Y. B. & C., 541; *Doe* v. *Smith*, 8 Bing., 146, 152; *Wroughton* v. *Turtle*, 11 Mees. & W., 561, 567; *Gurr* v. *Scudds*, 11 Exch., 190), though the rule regarding exemptions from general laws imposing taxes may be different (*Cooley on Taxation*, 145; *In matter of Enston*, 113 N. Y., 174, 177)."

(NOTE *that the oleomargarine law is not a "general law imposing taxes," but a law imposing "special taxes."*)

"We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language. (*Hartranft* v. *Wiegmann*, 121 U. S., 609; *American Net & Twine Co.* v. *Worthington*, 141 U. S., 468; *United States* v. *Wigglesworth*, 2 Story, 369; *Powers* v. *Barney*, 5 Blatchford, 202.)"

In *Bausinger* v. *United States*, 192 U. S., 38, 55, certain figures representing various saints and two figures of adoring angels had been specially imported into the port of New York in good faith for the use and by order of certain religious societies. The importers claimed the figures were entitled to free entry under paragraph 649 of the tariff act of 1897. The appraiser had returned them as "church statues composed of plaster of Paris decorated," or as "articles and wares composed wholly or in chief value of earthy or mineral substances not specially provided for," and the collector had assessed upon them a duty of 45 and 35 per cent. ad valorem under paragraphs 97 and 450 of the same act.

In deciding that these figures were entitled to free entry under paragraph 649 the Court, speaking by Mr. Justice Peckham, at page 55, uses this language:

"This provision of the statute (provision for free entry) should be *liberally* construed in favor of the importer, and *if there were any fair doubt* as to a true construction of the provision in question the Court should resolve the doubt in his favor. (*American Net & Twine Co.* v. *Worthington*, 141 U. S., 468; *United States* v. *Wigglesworth*, 2 Story, 369; *Rice* v. *United States*, 53 Fed. Rep., 910.)"

To the same effect are the English cases.

In *Tomplins* v. *Ashby*, 6 B. & C., 541, 543 (case of a stamp duty), Lord Tenterden, Ch. J., says:

> "Acts of Parliament imposing duties are so to be construed as not to make any instruments liable to them unless manifestly within the intention of the legislature."

In *Doe* v. *Smith*, 8 Bing., 147, 152 (case of a stamp duty), Tindal, Ch. J., says:

> "As all stamp acts, being a burden on the subject, must be clearly expressed, wherever they impose the burden, I should say that even if there were doubt, we should take the smaller sum."

In *Gurr* v. *Scudds*, 11 Exch., 190, 192, Pollock, C. B., says:

> "If there is any doubt as to the meaning of a stamp act, it ought to be construed in favor of the subject, because a tax cannot be imposed without clear and express words for that purpose."

In *Warrington* v. *Furbor*, 8 East, 242, 245, Lord Ellenborough, Ch. J., says:

> "Where the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out, and we should give a liberal construction to words of exception *confining the operation of the duty.*"

Every consideration is thus seen to require that all the questions certified by the Court of Appeals be answered in the negative.

Respectfully submitted,

JOHN MAYNARD HARLAN,
Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
DEC 17 1909
JAMES H. MCKENNEY,

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 398.

WM. J. MOXLEY, A CORPORATION, ETC., PLAINTIFF IN ERROR,

vs.

HENRY L. HERTZ, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF ILLINOIS, DEFENDANT IN ERROR.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

JOHN MAYNARD HARLAN,
Attorney for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 398.

WM. J. MOXLEY, A CORPORATION, ETC., PLAINTIFF IN ERROR,

vs.

HENRY L. HERTZ, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF ILLINOIS, DEFENDANT IN ERROR.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

The Solicitor General seemed, on the oral argument, finally to concede that it *is the inherent nature* of the color-giving substance and *not the amount* of it used in oleomargarine that is the test of artificial coloration. For example, he admits that color due to the use of even a minute quantity of natural June butter, of a deep yellow hue, would not be arti-

ficial coloration notwithstanding the other effects of so minute a quantity of natural June butter were slight and the inducing motive in using it were merely to impart color. For in its nature, he says, butter-fat is "natural to oleomargarine," and, therefore, does not become artificial merely because only a minute quantity may have been used.

But the Solicitor General says:

> "The things truly natural to oleomargarine—that is, which produce the essential nature or character of oleomargarine—must be determined by the history of its manufacture and by the established, general conception of oleomargarine. By those fundamental tests, oleomargarine is an article manufactured from animal fats; and a vegetable oil is a foreign, and so artificial, addition to oleomargarine, just as much as if it were not named at all in the statute and just as much as any one of the unnumbered substances, not named in the statute, which may be added to true oleomargarine without taking the mixture or compound out of the statute. When, therefore, a substance is added to oleomargarine which, like palm oil, is foreign to the true nature of oleomargarine, any resultant qualities are artificial; and if butter color is one of those added qualities we have a case of artificial coloration, whether or not other qualities than color are given by the same foreign addition."

Now, what is "the essential nature or character of oleomargarine, both historically and by the established, general conception of oleomargarine?" And is it true, as claimed by the Solicitor General, that all vegetable oils, including palm oil, are "foreign to the essential nature or character of oleomargarine.?"

To be sure, section two of the oleomargarine law says "that, *for the purpose of this act*, certain manufactured substances, certain extracts, and certain mixtures and compounds, etc. (naming various fats and oils, including *vege-*

table oil) shall be known and designated as oleomargarine" whenever "made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter"; and this court, in Schollenberger *vs.* Pennsylvania, 171 U. S., 8, and in McCray *vs.* United States, 195 U. S., 27, referred to this statutory provision as giving a definition of the meaning of oleomargarine. Nevertheless, the Solicitor General insists that the statute "was not intended to define what oleomargarine truly is or decide whether any particular substance is essential or natural to it" (Gov't Brief, 19), and that we must look entirely *outside of the act* for a test to determine whether or not, *within the meaning of the act*, oleomargarine, in any given instance, is "free from artificial coloration" and is, accordingly, subject to the higher or the lower tax imposed by the act.

The Solicitor General adverts to the historical fact that oleomargarine was first devised in 1872 or 1873 by the French scientist, M. Mege-Mouries, who had been employed by the French Government to devise a substitute for butter (Schollenberger *vs.* Pennsylvania, *supra*), and the result of whose quest was that "he discovered a process whereby he was able to extract from beef-suet *a fat very similar to that of butter*" (Gov't Brief, p. 21).

That which, in the discovery of M. Mege-Mouries, was essential to the nature or character of oleomargarine was the elemental "fat very similar to that of butter." Whether that elemental fat were extracted from beef-suet, lard, or vegetable oil was and is quite immaterial. In either case its characteristic, making it suitable for use in oleomargarine, is its similarity to butter.

It is not the particular source from which the fat may have been extracted, but it is its quality—"like that of butter"—that is characteristic of the essential nature of oleomargarine. Accordingly, when it was "found that an extract similar to that obtained by

M. Mege-Mouries from beef-suet can be obtained from lard" (Gov't Brief, 22), that newly found fat, known as neutral lard or neutral, became, not because of its source, the hog, but because of its quality—"like that of butter"—a proper or natural ingredient of oleomargarine.

By the same token certain vegetable oils, notably palm oil, have been found to contain fat of a quality "like that of butter" and have long been successfully employed in oleomargarine. Certainly no ingredient could be more characteristic of the essential nature of oleomargarine, as a butter substitute, than is palm oil, composed, as it is, almost entirely of palmatine and olein, which are the *chief constituents of pure butter itself.*

Now let us look briefly at "the history of the manufacture of oleomargarine" and the "established general conception of oleomargarine," particularly in this country.

1. Prior to the passage of the oleomargarine law, in 1886, the following, among other, patents were issued by the United States for making oleomargarine partly *from vegetable oils:*

Samuel H. Cochran, No. 258,992, dated June 6, 1882:

The combination of beef-suet oil, cotton-seed oil and its equivalents, purified and flavored as described, with beef-stearine and slippery-elm bark.

Samuel H. Cochran, No. 10,171, reissued, dated August 1, 1882:

A combination of beef-suet oil, cotton-seed and its equivalents, with beef-stearine.

Samuel H. Cochran, No. 262,207, dated August 8, 1882:

Compound composed of the oil obtained from swine fat,

cotton-seed oil and its equivalents, deodorized and purified by slippery-elm bark and beef-stearine.

John Hobbs, No. 263,042, dated August 22, 1882:

The vegetable stearine to be used can be obtained from any pure vegetable, seed, or nut oils by pressing them at a temperature as above set forth, or it may be obtained in the market at times as vegetable stearine.

George S. Marshall, No. 264,545, dated September 19, 1882:

Process of deodorizing, purifying, and flavoring stearine obtained from animal fats or vegetable oils by boiling the same with water and mixing therewith powdered orris root.

Henry R. Wright, No. 267,637, dated November 14, 1882.

Process of making artificial butter or creamine, which consists in mixing together the oils derived from animal fat at low temperatures with sweet cream, the oil of butter, vegetable oil, and coloring matter; then allowing these ingredients to become sour while together; then removing the whey, and finally churning the mass.

John Hobbs, No. 289,100, dated November 27, 1883:

The manufacture of deodorized fats or oxyline the use or employment of the substance herein mentioned—vegetable stearine—in combination with the other ingredients named—oleomargarine-stearine and oleomargarine-stock.

2. Shortly before or at the time of the passage of the oleomargarine law, in 1886, Mr. Philip D. Armour, of Armour & Company (a letter from which firm, dated in 1891, to the Standard Dictionary is quoted from in the Government Brief, p. 24), and Mr. Gustavus F. Swift, of the firm of Swift & Company, gave to a committee of the United States Senate descriptions of the methods in use by their respective firms

in the manufacture of artificial butter. In closing his statement Mr. Armour said: "At certain seasons of the year, viz., in cold weather, a small quantity of salad oil, made from cotton-seed, is used *to soften the texture of the product*, but this is not generally used by us." Mr. Swift, in closing his statement, said: "At certain seasons of the year, viz., in cold weather, a small quantity of salad oil, made from cotton-seed, is used *to soften the texture of the product.*"

3. As further showing that the "established general conception of oleomargarine" (Gov't Brief, p. 20) as actually manufactured, includes vegetable oils among the ingredients containing fats of a quality "like that of butter" and, therefore, "truly natural to oleomargarine" and contributing to its "essential nature or character," the following are pertinent:

(*a*) Authorities cited by the Solicitor General:

Allen's Chemical Organic Analysis, vol. 2, part 1 (3d ed.), regarded by the Government as a standard work (Gov't Brief, 10), says (185):

> "Various *factitious butters or butter substitutes* are now extensively manufactured and sold under the name of oleomargarine, or margarine. The former is the legal title in the United States for all butter substitutes; the latter is the legal title in England and several other countries. For the manufacture of these factitious butters the fat is usually carefully selected, and brought to a proper consistency by removing the less fusible portion by hydraulic pressure, or increasing the proportion of olein *by adding sesame, arachis, or cotton-seed oil.* The fat is then usually incorporated with milk and salt, and colored with annotta, &c., and sometimes more or less real butter is also added. A small amount of glucose is now often added. It is stated also, that butyric acid and certain butyrates have been employed in order to produce a still closer imitation of true butter. *Among the fats known to be successfully employed*

> *are:* the more fusible portions of mutton and beef fat; lard; cotton-seed oil; sesame oil; arachis oil; *palm oil,* and purified cocoanut oil. Horse fat, bone, fat, and grease are also said to be used. "

Lewkowitsch's "Chemical Analysis of Oils, Fats, and Waxes" (3d ed.)—the Solicitor General cites the second edition, not available to the writer—says (page 709): "Palm oil has a somewhat sweetish taste; in its perfectly fresh state is a good edible fat, and is used as such in Africa *even by Europeans.*" European stomachs, I suppose, are no less sensitive and exacting than American stomachs, which the Solicitor General thought might be offended by palm oil.

(Page ~~701~~ 711) "The chief constituents of palm oil are palmitin and olein."

(Page ~~715~~ 719) "A good working receipe for the manufacture of margarine (the English word for what is in the United States called oleomargarine) is the following:—Mix 65 parts of oleomargarine (called oleo-oil in the United States), 20 parts of vegetable oils, and 30 parts of milk. The yield is 100 parts of finished product, 15 parts of water being eliminated in the course of manufacture" (~~page 978~~).

Encyclopedia Americana, volume 11, title Oleomargarine, cited by the Solicitor General, defines oleomargarine in general as being "a mixture of fats used as a substitute for butter." And, referring to oleo-oil, it says: "The name 'oil' is somewhat misleading as the product is a granular *solid* of a slightly yellow color"—a fact which shows the advantage of using in oleomargarine designed for consumption in a cool climate a small quantity of vegetable oil "to soften the texture," as was said by Mr. Armour and Mr. Swift in their statements to the Senate Committee in 1886.

In the "Yearbook of the United States" (Department of Agriculture) for the year 1895 (pages 445, 447), we find, in discussing the manufacture and sale of oleomargarine, it is said: "The process as at present used, however, is comparatively simple. The oleo-oil and "neutral" lard are mixed

together, either alone or with the addition of *cotton-seed oil* or milk and butter in steam-jacketed vessels, provided with paddles, the resulting product being called oleomargarine or butterine, according to the quantity of butter used."

"The lard used for oleomargarine is usually good leaf lard. The cotton-seed oil used in the manufacture of oleomargarine is probably *the most healthful of all its constituents* as, generally, a good quality is selected."

(*b*) Authorities not cited by the Solicitor General:

In Circular No. 56, issued by the United States Department of Agriculture, entitled "Facts Concerning the History, Commerce and Manufacture of Butter, by Harry Hayward, M. S., Assistant Chief of Dairy Division, Bureau of Animal Industry, the author, at page 193, says: "As is well known, oleomargarine is a mixture of various animal and vegetable fats, which is churned with milk to impart a butter flavor."

Dr. Harvey W. Wiley, the Government expert, in his work entitled "Foods and Their Adulteration," says (page 187): "Oleomargarine is the name applied to *any fatty substance* which is prepared to be used in the same manner as butter."

(Page 188:) "These (cotton-seed oil and cotton-seed oil stearin) are also important ingredients of oleomargarine affording the oily or more liquid constituents which, when mixed with the lard and stearin above mentioned, form a compound the melting point of which is slightly above that of butter and sufficient to maintain it in an unmelted state even in warm weather. The quantities in which these different ingredients are used vary greatly in different manufacturing establishments and depend largely upon the location where the oleomargarine is to be used. When manufactured for tropical or subtropical regions, larger quantities of stearin are employed than when used in temperate zones or for winter consumption, in which case larger quantities of cotton-seed oil and cotton-seed oil stearin are employed with

the mixture. After *the fats* are mixed it is usually the practice to churn them with milk in order to give a flavor of butter to the product."

It seems clear that, historically as well as by "the established general conception of oleomargarine," a vegetable oil which, like palm oil, is composed almost entirely of *the elemental fats which are the chief constituents of pure butter*, cannot, in any sense, be regarded as *foreign* to oleomargarine, *a substitute for butter*. On the contrary, such a vegetable oil is, according to the language of the Solicitor General, "truly natural to oleomargarine" and contributes to "produce the essential nature or character of oleomargarine."

To denominate as artificial coloration a color due to such an oil as palm oil is shown to be, not only by the special findings of the trial court, but by the standard authorities on chemistry cited in the Government's brief, it is earnestly, but most respectfully, submitted, would be a contradiction in terms.

II.

The principle of the Cliff case (195 U. S., 159), taken in connection with the McCray case (195 U. S., 27), logically requires negative answers to all the certified questions.

The Solicitor General's "comparison," in parallel columns, of the facts of the *Cliff* case with the findings of fact in the case at bar is fallacious and misleading. He wholly omits reference to important and controlling facts which are found in this case but *are not shown* in the *Cliff* case, namely:

(*a*) That "palm oil is a *pure* vegetable oil," and "has about the consistence of pure butter."

(*b*) That "palm oil consists almost entirely of palmatine and olein, *which are the chief constituents of pure butter*."

(*c*) That "palm oil was successfully employed in oleomargarine prior to May, 1902" (the date when "artificial coloration" first became the statutory basis for determining whether a tax of 10 cents or a tax of one-fourth of one cent per pound should be paid on oleomargarine).

(*d*) That "palm oil is perfectly wholesome, is readily digested, and has long been used as an article of food in countries where it is produced."

(*e*) That "palm oil is a proper constituent of oleomargarine."

These findings, with others, showed affirmatively what did not appear in the *Cliff* case, that palm oil is itself "suitable for food," and that it "improves the texture, quality, and healthfulness of the oleomargarine." Therefore, *by the very test explicitly prescribed by the Cliff case*, palm oil was an authorized food ingredient, and hence (under the McCray case, 195 U. S., 27), it not being itself artificially colored, the resemblance to butter imparted by it to oleomargarine was not "artificial coloration" within the meaning of the oleomargarine law as amended May 9, 1902.

III.

The rule that one who claims the benefit of an exception must make it clear that he comes within its scope has no application to this case.

The claim in the Government's brief that the proviso in section 8 of the amendatory oleomargarine act of May, 1902, is in the nature merely of an *exception* to the regular tax of ten cents per pound is not in conformity with the rulings of this court, in cases where the issue involved required exact interpretation of a proviso added by amendment to a previously enacted and established law—as was the case

with the proviso added in May, 1902, to the eighth section of the oleomargarine law of 1886.

The proviso of the eighth section of the oleomargarine law, as amended in May, 1902, is really **an independent enactment.**

In *Interstate Commerce Commission v. Baird*, 194 U. S., 25, the court, speaking by Mr. Justice Day, at page 36 *et seq.*, said:

> "It is true that the office of a proviso, strictly considered, is to make exception from the enacting clause, to restrain generality and to prevent mis-interpretation (citing cases). It is apparent that this proviso was not inserted in any restrictive sense or to make clear that which might be doubtful from the general language used. It was inserted for the purpose of *enlarging* the operation of the statute so as to include a class of cases not otherwise within the operation of the section. It may be admitted that this use of a proviso is not in accord with the technical meaning of the term or the office of such part of a statute when properly used. *But it is nevertheless a frequent use of the proviso in Federal legislation to introduce, as in the present case, new matter extending rather than limiting or explaining that which has gone before.*"

In *U. S. v. Whitridge*, 197 U. S., 135, the court, speaking by Mr. Justice Holmes, at page 143, said:

> "While no doubt the grammatical and logical scope of a proviso is confined to the subject matter of the principal clause, we cannot forget that in practice no such limit is observed and when, as here, *we are dealing with an addition made in new circumstances to a form of words adopted many years before, the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.*"

Citing with approval

Georgia R. R. & Banking Co. v. Smith, 128 U. S., 174.

The above language was quoted with approval in the case of *U. S. v. G. Falk & Bro.*, 204 U. S., 143.

In *Georgia R. R. & Banking Co. v. Smith, supra*, cited with approval in *U. S. v. Whitridge, supra*, in discussing the construction of a proviso in the charter of the Georgia Railroad and Banking Company, that court, speaking by Mr. Justice Field, said:

> "The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater significance than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

See also—

United States v. Babbitt, 1 Black, 55.

Savings Bank v. Collector, 3 Wall., 495.

Section 8 of the original oleomargarine law, passed August 2, 1886, was as follows:

> "SEC. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of two cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

Now, when Congress came to amend this section by the act of May 9, 1902, all that was done was to change the word "two" to "ten" and to add after the first sentence in the section these words:

> "*Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound."

Is this not a perfect example of the "common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided' "? Is not the office of the word "provided" that of "simply serving to separate or distinguish the different paragraphs or sentences," thus classifying oleomargarine for the purposes of Federal taxation into two classes—

(*a*) Oleomargarine not free from artificial coloration, upon which ten cents per pound must be paid, and

(*b*) Oleomargarine free from artificial coloration, upon which only one-fourth of a cent per pound is to be paid?

But even if the proviso in section 8 as amended were to be regarded as an exception to the preceding part of section 8, nevertheless it should be construed liberally in favor of the manufacturer and tax-payer.

In *Eidman v. Martinez*, 184 U. S., 578, a case requiring the construction of the New York inheritance tax law, the court, speaking by Mr. Justice Brown, said:

> "It is an old and familiar rule of the English courts applicable to all forms of taxation, and *particularly special taxes*, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that *a liberal construction* be given to words of exception *confining the opera-*

> *tion of the duty* (citing cases), though the rule regarding exemptions from general laws imposing taxes may be different." (Citing cases.)
>
> (NOTE *that the oleomargarine law is not a "general law imposing taxes," but a law imposing "special taxes."*)
>
> "We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language" (citing cases).

In *Warrington v. Furbor*, 8 East, 242, 245, Lord Ellenborough, Ch. J., says:

> "Where the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out, and we should give a liberal construction to words of exception *confining the operation of the duty.*"

IV.

The amount of the revenue tax paid on oleomargarine bears no causal relation to the accomplishment of the purpose of the act, to prevent the sale of oleomargarine as and for butter.

Under the law every package of oleomargarine free from artificial coloration, and therefore stamped tax-paid at the rate only of one-fourth of a cent per pound, is required to be marked, stamped, and branded in the same manner as a package of oleomargarine taxed at the rate of ten cents per pound, with the single exception of the difference of figures on the stamps. The marking, stamping, and branding, as required by the law, will be no less effective to prevent deception on account of the smaller denomination of the stamps used. The stamps of the smaller denomination will be just as conspicuous as those of the larger denomination, and the

marking and branding just as plain and effective in the one case as in the other.

If, on the other hand, as the writer does not believe, the purpose of Congress was to prevent deception *by preventing altogether the sale* of oleomargarine of such quality and color as to be useful for family consumption, then it would seem to be clear upon principle and authority that, in so far as the purpose of Congress was to *prohibit* the sale of oleomargarine, that purpose should not be accepted by this court as its guide for the interpretation of the act.

In passing upon the constitutionality of the oleomargarine law of 1886, in *In re Kollock*, 165 U. S., 526, this court, speaking by Chief Justice Fuller, said:

> "The act before us is, on its face, an act for levying taxes, and although it may operate, in so doing, to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue."
>
> This was quoted with approval in *McCray v. United States, supra.*

Viewing and construing the act as an act for the raising of revenue, the numerous cases already cited show that where there is doubt the act should be interpreted favorably to the manufacturer and tax-payer, *limiting the amount of the tax to the smaller rate unless it is clear that the higher rate applies to his product.*

To cite the purpose of the act, to prevent deception, as a reason for resolving doubt against the manufacturer and tax-payer, is, in effect, to treat the act, not as an act for raising revenue, but as a remedial act. Since, however, the branding, marking, and stamping of the package with stamps of the lower denomination will be as effective to prevent deception as if the package were stamped with stamps of the higher denomination, it seems apparent that the accomplishment of this purpose of the act—to prevent deception—is not at all incompatible with the application of the rule that in con-

struing revenue laws doubt should be resolved in favor of the tax-payer.

Moreover, if the act be regarded from the view-point of its remedial purpose, the imposition of the ten-cent tax in a case of doubt might fairly be considered as *in the nature of a penalty*, since the tax of one-fourth of a cent per pound, with the branding, marking, and stamping in accordance with law, would as surely accomplish the purpose of preventing deception; and the imposition of a penalty by construction, as it were, ought not to be favored, especially where the act, as in this case, provides specific penalties for its violation.

Again, viewing the act in its remedial aspect, a construction that would impose the ten-cent tax in case of doubt, where the remedial purpose would be as well effected by the smaller tax, would substantially impute to Congress the intention, under the guise of a tax levied to raise revenue, to inflict a destructive penalty upon the manufacture of an article the commercial character of which is thoroughly established and the wholesomeness of which is abundantly attested by the enormous growth in its use in every civilized country during the last twenty-five years. (*Schollenberger v. Pennsylvania*, 171 U. S., 1, 8-12.) Such, it is respectfully submitted, should not be presumed to have been the intention of Congress, and if there is any reasonable interpretation of the act which would avoid imputing such an intention to Congress that interpretation, it seems to the writer, should be adopted.

In conclusion it is respectfully submitted that when the opinion in the *Cliff* case is rationally interpreted in the light of the Government's contention and the issue there involved, that case is entirely consistent with and supports the position of plaintiff in error here, namely, that resemblance to butter of a shade of yellow caused by the use of palm oil, which is a pure vegetable oil, *suitable for food and in its nature such as to make oleomargarine suitable for food*, is not artificial

coloration, and that oleomargarine having such resemblance to butter, due to the use of palm oil, is free from artificial coloration within the meaning of the proviso of the 8th section of the oleomargarine law as amended in May, 1902, and is therefore subject to a tax only of one-fourth of a cent per pound. If this view of the *Cliff* case is sound, then it follows that all the three questions of law submitted by the Court of Appeals to this Court should be answered in the negative.

Respectfully submitted,

JOHN MAYNARD HARLAN,
Attorney for Plaintiff in Error.

[4562]

[illegible]

No. 389.

In the Supreme Court of the United States.

October Term, 1909.

William J. Moxley, a corporation organized and existing under the laws of the State of Illinois, plaintiff in error,

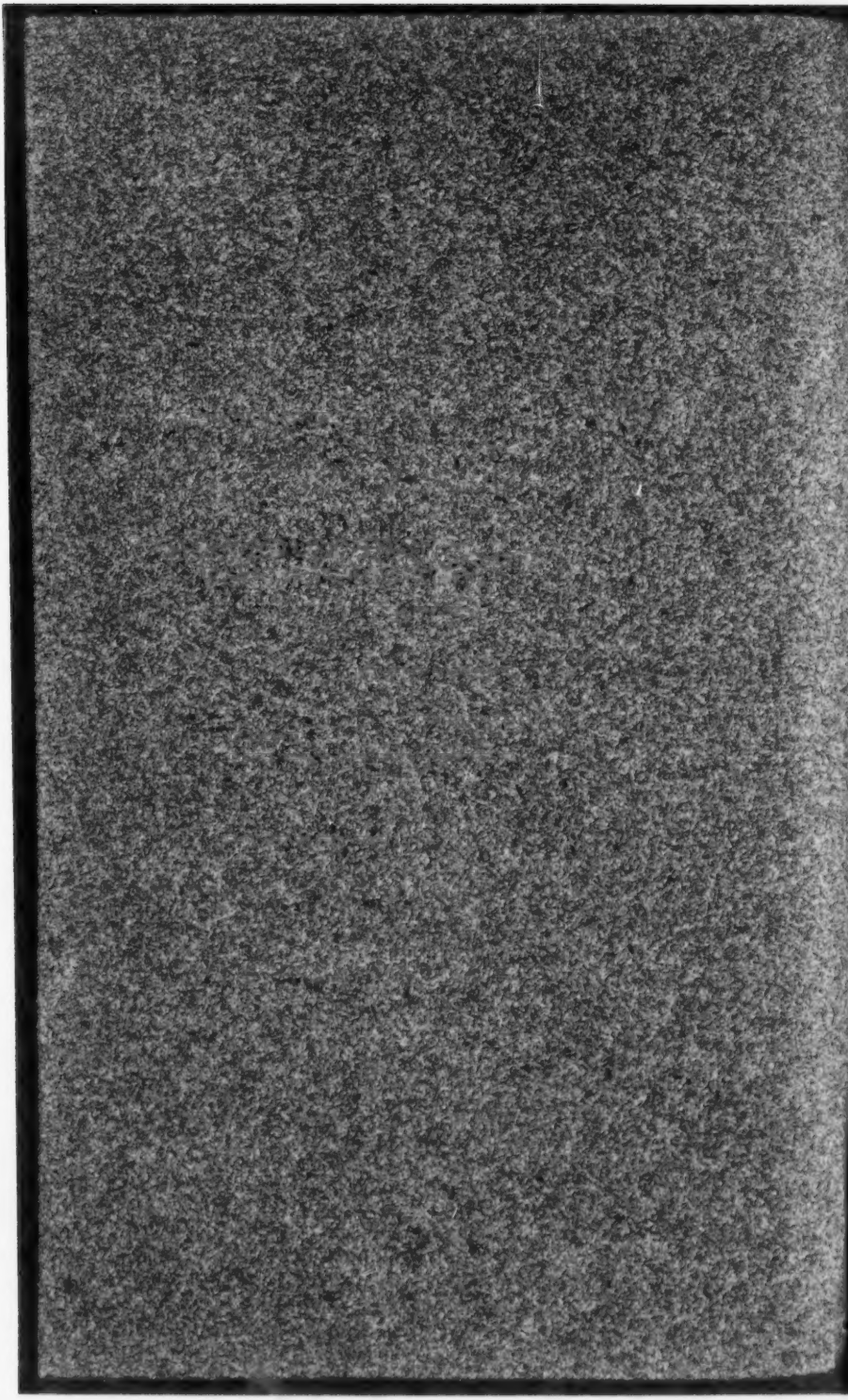
v.

Henry L. Hertz, collector of internal revenue for the First Collection District of Illinois, defendant in error.

On writ of error to the United States circuit court for the Northern District of Illinois.

BRIEF FOR THE UNITED STATES.

[illegible]



In the Supreme Court of the United States.

OCTOBER TERM, 1909.

WILLIAM J. MOXLEY, A CORPORATION organized and existing under the laws of the State of Illinois, plaintiff in error.	
v.	No. 398.
HENRY L. HERTZ, COLLECTOR OF INTERNAL Revenue for the First Collection District of Illinois, defendant in error.	

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT

In *Cliff v. United States* (195 U. S., 159) it was held that the evidence submitted to the trial court in that case was sufficient to sustain a finding that *palm oil* "served substantially only to color" oleomargarine, and that when any substance "*substantially serves only the function of coloring the mass, and so as to cause the product to 'look like butter of any shade of yellow' it is an artificial coloration*" under section 8 of the oleomargarine act of 1886, as amended by section 3 of the

oleomargarine act of 1902 (32 Stat., 193). The oleomargarine involved in the *Cliff* case was manufactured by the present plaintiff in error; but, plaintiff in error not being estopped by the judgment in that case, it urges in the present case that palm oil does not "substantially serve only the purpose of coloring." The ineffectuality of this attempt will be apparent from the following comparison of the facts which were held sufficient to sustain the conclusion in the *Cliff* case with the findings of fact on which was based the judgment against plaintiff in error in this case:

Cliff case.	*Present case.*
1. That the oleomargarine "had been colored with palm oil to a very decided shade of yellow, like natural June butter" (p. 164).	1. That "the oleomargarine involved in this suit looked like butter of a shade of yellow, and such resemblance to butter of a shade of yellow was caused by the presence of the palm oil used in said oleomargarine." (Rec., 2.)
2. That "a very small proportion of palm oil is necessary only to produce what is considered a desirable color in oleomargarine" (p. 164). The proportion actually used was 1½ ounces of palm oil out of a total of 160 ounces, or about nine-tenths of 1 per cent by weight (p. 161).	2. That "the proportion of palm oil present in said oleomargarine was about one half of one per cent. (½%) of the total volume of said oleomargarine." (Rec., 2.)
3. That "the secretary of the manufacturer" [i. e., the secretary of the present plaintiff in error] testified that "before July 1, 1902, we used	3. That although "palm oil *probably* gives to the oleomargarine *slightly* better grain of texture, causing it to act more like butter in the frying

only the Wells-Richardson improved butter color to produce an artificial coloration. Since that date we have used the same article. We have used some palm oil. We used that for a few days only until the Commissioner of Internal Revenue ruled that its use would subject the product to the 10 cent tax" (pp. 164-5).

4. That the oleomargarine was made from oleo oil, neutral lard, milk, salt, cotton-seed oil, and palm oil (p. 161).

pan, and it also caused said oleomargarine to have a better physiological effect" on those who ate it, yet "such function of the palm oil, other than as coloring matter, was *slight*, and *but for the coloring imparted to the oleomargarine, would not probably have been actually used in its manufacture.*" (Rec., 2-3.)

4. That the oleomargarine was made from oleo oil, lard, milk, cream, salt, cotton-seed oil and palm oil. (Rec., 2.)

N. B.—The difference in constituents lies only in the addition now of some cream. The opinion of the trial court was:

> Independently of my own judgment, were this a case of first impression, I am bound, I think, by the authority of *Cliff* v. *United States* (195 U. S., 159), to enter judgment on this state of facts against the plaintiff and in favor of the defendant.

I shall insist, as the trial court decided, that the *Cliff* case in all essential facts is the same as the present case and that its law reaches to this case; and, beside that, I shall urge that (while the *Cliff* case rests upon unavoidable logic and was really involved in *McCray* v. *United States* (195 U. S., 27), decided five months earlier, and is sufficient for disposition of the present controversy) the rule of the *Cliff* case stops short of the fundamental division between natural and

artificial colorants of oleomargarine; and my several propositions will be:

I. The *Cliff* case, *supra*, governs the case at bar; and under that decision the first question now certified to this court must be answered in the affirmative. Response to the second and third certified questions will then become unnecessary.

II. Simple and inevitable logic compelled the rule of the *Cliff* case; and the same logic applies equally to an article which does nothing but color oleomargarine like butter and to an article which, though it be said to have some other slight effects beside coloring, has no substantial result but to color.

III. The mere fact that the substance used to give butter color to oleomargarine is enumerated in the statute as one of the things whose presence in the "mixtures and compounds" denominated generally as oleomargarine will not relieve the mixture or compound from the operation of the law, does not make butter coloration through the use of such substance natural instead of artificial. The true distinction is unconnected with the statutory enumeration and must be discovered elsewhere, viz, in the true nature of oleomargarine as universally recognized, and not altered by the statute, or in the natural relation of the colorant to the end—i. e., butter color—sought to be accomplished.

IV. The things truly natural to oleomargarine—that is, which produce the essential nature or character of oleomargarine—must be determined by the history of its manufacture and by the established

general conception of oleomargarine. By those fundamental tests, oleomargarine is an article manufactured from animal fats; and a vegetable oil is a foreign, and so artificial, addition to oleomargarine, just as much as if it were not named at all in the statute and just as much as any one of the unnumbered substances, not named in the statute, which may be added to true oleomargarine without taking the mixture or compound out of the statute.

When, therefore, a substance is added to oleomargarine which, like palm oil, is foreign to the true nature of oleomargarine, any resultant qualities are artificial; and if butter color is one of those added qualities we have a case of artificial coloration, whether or not other qualities than color are given by the same foreign addition.

V. If the natural or artificial character or coloration of oleomargarine by the addition of palm oil is not to be determined by the universal conception of oleomargarine as a product of animal fats, the only remaining test is whether the colorant is natural with reference to the end sought, viz, butter color. By that test, only butter itself is a natural colorant; anything else is artificial. This test, too, leads to the same practical result as that urged in Point IV; for the only animal fat that will give butter color is butter itself.

VI. The statutory proviso, relieving naturally colored oleomargarine from the general tax of 10 cents per pound, is not to be construed liberally in favor of the manufacturer. The statutory distinction

between naturally and artificially colored oleomargarine has a remedial purpose, namely, protection of the purchasing and consuming public against deception through imposition upon them of articles which are neither true butter nor true oleomargarine. Such remedial legislation must be construed liberally toward accomplishment of the legislative purpose.

VII. The first certified question must be answered in the affirmative; or, if that question is unsupported by the actual facts of the case, the certificate must be dismissed or the whole case should be brought up by certiorari for disposition on its real merits.

ARGUMENT.

I.

The *Cliff* case (195 U. S., 159) governs the case at bar; and under that decision the first question now certified to this court must be answered in the affirmative. Responses to the second and third certified questions will then become unnecessary.

1. A comparison of the facts dominating in this case and in the *Cliff* case has already been given in parallel columns (*ante*, pp. 2, 3). Little need be said in comment. It is entirely apparent that if in the *Cliff* case the palm oil had no other substantial operation than to color, the same is true here.

Further, the first certified question can not be understood as attributing to the palm oil in this case any substantial effect but coloration. That question must be interpreted in the light of the findings of fact, and must be made to accord with them. Otherwise the question becomes moot, for the certificate is irrelevant to the actual case. This court can not

be called upon to answer abstract questions on certificate of a court of appeals any more than on writ of error or appeal.

The express finding of the trial court that the "*function of the palm oil, other than as coloring matter, was slight, and but for the coloring imparted to the oleomargarine, would not probably have been actually used in its manufacture*" (Rec., 2, 3) is decisive. It can mean only that there was no substantial inducement for the use of palm oil but its coloring effect. The palm oil constituted "about one-half of one per cent" of the total volume of oleomargarine (Rec., 2). It would have been ridiculous for the trial court to find otherwise than it did. The use of palm oil being induced only by its coloring effect, it can have had no other substantial operation.

The trial court's interpretation of its own finding as bringing the case entirely within the *Cliff* case is also decisive that it meant by those findings that the palm oil did not operate substantially except to color. The exact language often repeated by this court in the *Cliff* case having been that "when any substance, although named as a possible ingredient of oleomargarine, substantially serves only the function of coloring the mass, and so as to cause the product to 'look like butter of any shade of yellow,' it is an artificial coloration" (p. 164), the court below could not have held this case within the *Cliff* decision without holding that the palm oil in plaintiff in error's oleomargarine "substantially serves only the function of coloring."

The very slight, indeed insignificant, quantity of palm oil used in this case—a fraction of 1 per cent, as in the *Cliff* case—makes it impossible to regard the palm oil as anything but a colorant. The inference is of the most simple and unavoidable kind; and it led, after the decision in the *Cliff* case, to a revision of the regulations of the Internal Revenue Bureau concerning artificial coloration of oleomargarine. The present regulations, as revised in July, 1907, read (p. 28):

> Section 8 of the act of May 9, 1902, fixes the rate of tax on oleomargarine at 10 cents per pound, but provides that when the product is free from artificial coloration that causes it to look like butter of any shade of yellow the tax shall be at the rate of one-fourth cent per pound.
>
> The materials most commonly used in the manufacture of oleomargarine are enumerated in section 2 of the act of August 2, 1886, but this is not regarded as excluding or prohibiting the use of other materials not included among those thus designated. *However, when an ingredient is used ostensibly as a necessary component part of the product, but in fact in minute quantities, for the sole purpose of imparting a shade of yellow, causing the oleomargarine to look like butter, it is held that such product is artificially colored and subject to tax at the rate of 10 cents per pound.* (Revised Regulations concerning Oleomargarine: Internal Revenue Bureau, July, 1907.)

Whether or not the Commissioner of Internal Revenue can establish an arbitrary and unvarying standard for judging the function of an ingredient of oleomargarine always by its quantity, the fact that a merely trifling quantity is used has unmistakable evidential force.

While, as the trial court found, palm oil "is perfectly wholesome, is readily digested, and has long been used as an article of food in countries where it is produced" (Rec., 2), those countries are all in Africa, and their inhabitants who use palm oil for food are barbarian negroes. Their dietary standards are not commonly such as civilized taste approves. The stated finding of the trial court, while declaring palm oil to be innocuous, does not state it to be attractive; nor can it support a conclusion that a considerable quantity of palm oil would be accepted by American stomachs. The contrary may be gathered both from the fact that palm oil has not come into general use as a food in any civilized country and from the descriptions of it in standard authorities. On this subject the following was said in the Government's brief in the *McCray* and *Cliff* cases:

> What is palm oil, and what was the purpose of its use in this formula? For a full description of its properties and uses we refer the courts to *Lewkowitsch's "Chemical Analysis of Oils, Fats, and Waxes"* (2d ed.), *page 517*, and to *Allen's "Chemical Organic Analysis,"*

vol. 2, part 1 (3d ed.), page 161, both standard works on chemistry.

These chemists (authors) say that palm oil is the product, mainly, of the fruit of two species of palm trees; that in color it varies greatly, ranging through all shades from orange yellow to dark, dirty red; in consistency, from soft lard to that of hardest tallow; that when fresh it has a somewhat sweetish taste, but *on becoming older it has a rancid and a more or less disagreeable smell;* in its fresh state the proportion of fatty acids, calculated as palmitic acid, amounts to 12 per cent, and may in older samples reach 100 per cent; frequently it contains from 50 to 70 per cent of free palmitic acid, and that *it is chiefly used in the manufacture of soap, candles, and axle grease.*

Moxley, the manufacturer of this oleomargarine, in June, 1902, submitted to the Commissioner of Internal Revenue, for analysis, a sample of crude palm oil. After examination and analysis the Commissioner (Rec., p. 9) replied that "the oil was rancid, of bad taste and smell, and that it was considered by this office wholly unfit for use in oleomargarine." Thereupon Moxley submitted a sample of what he termed "refined palm oil." As to this sample, the Commissioner, after stating that it had been examined and chemically analyzed, says:

"It was found to contain a large amount of free fatty acid; it was by no means free from disagreeable odor and taste, and was of a very deep red or orange color. *If oil like the sample*

were used in any considerable quantity as one of the fatty ingredients, it would undoubtedly cause a condition under which this office would rule that the oleomargarine contained an ingredient deleterious to public health and offensive in taste and odor."

And the Commissioner then continues:

"After this second sample had been submitted and the matter was under advisement in this office, fullest opportunity was given for hearing and oral argument by you and others interested upon the subject of the use of palm oil in the manufacture of oleomargarine. As a result of the examination made of the samples of oil submitted, it was virtually agreed at the hearing that *palm oil of the grade of the samples examined could not be introduced into the manufacture of oleomargarine in considerable quantities as oleo oil, neutral oil, cotton-seed oil, butter, or milk is now introduced, but only in quite small quantities or proportions.* It was further found by examination in this office that, take any given quantity of unartificially colored oleomargarine the same being virtually white in appearance if three-tenths of 1 per cent of the palm oil submitted was introduced therein it would give to the finished product a shade of yellow, and that the finished product would, in appearance, be in imitation or semblance of butter. In other words, that if to the finished sum total of uncolored oleomargarine in weight 1,500 pounds there was added a little less than 5 pounds of this palm oil, the result would be a marked change in color, there being secured through

the introduction of the palm oil to the finished product a shade of yellow, causing the finished product to look like butter."

And this is the conclusion of the Commissioner:

"This office rules that *where so minute and infinitesimal a quantity of a vegetable oil* is used in the manufacture of oleomargarine as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, *it can not be considered that the oil is used with the purpose or intention of being a bona fide constituent part or element of the product*, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and, therefore, that the oleomargarine so colored is not free from artificial coloration and becomes subject to the tax of 10 cents per pound" (pages 97–99 of Government's brief in the *McCray* and *Cliff* cases).

These things do not encourage general confidence in palm oil's dietetic merits.

As further found by the trial court, "palm oil was successfully employed in oleomargarine prior to May, 1902" (Rec., 2); but this finding does not inform us as to the quantity in which or the purpose for which palm oil was so used. The truth is—and no reputable evidence can be produced in contradiction—that palm oil has never been used in oleomargarine except as in the *Cliff* case and in this case, i. e., in trivial quantity and for the coloring purpose.

Finally, it is significant that from the customary formulæ for making oleomargarine given in the

Twelfth Federal Census, volume 9, Manufactures, part 3, page 521, it appears that coloring matter is uniformly a fraction of 1 per cent of the total weight—just as palm oil was in the *Cliff* case and is in this case. Indeed, it is of the essence of a colorant that it have high coloring power in slight quantity, because then the color can be obtained without substantial alteration of the article's general nature.

2. But it is asserted that the *Cliff* case was limited by its facts to oleomargarine in which palm oil operates solely to color, and that the rule announced as to an ingredient which does something else than color, but not in a substantial degree, was dictum. It is difficult to see why practically the same fraction of 1 per cent of palm oil should operate solely to color in the *Cliff* case, but do more here—especially when the oleomargarine is made by the same manufacturer and from materials identical, except as to cream. But, passing that, the rule as to the necessity for some substantial operation beside coloring was not dictum.

The *Cliff* case was tried by the court without a jury, and the trial judge made only a general finding against Cliff. The question before this court, therefore, was, as it would have been concerning a jury's verdict, whether the evidence would reasonably sustain *any* view of the palm oil's operation upon oleomargarine which would make it an artificial colorant; and it was held that under the statute any substance is an artificial colorant which does substantially nothing but color, and that the evidence supported a conclusion that palm oil in Cliff's oleomargarine

did nothing substantially but color. It was not necessary for this court to conclude that the palm oil in Cliff's oleomargarine acted solely to color, and therefore it did not so pronounce, but stopped with what was sufficient, viz, that the palm oil operated substantially only to color. It was expressly declared:

> The verdict of a jury is conclusive upon a question of fact unless plainly against the evidence. The same weight, as we have said, must be given to the finding of a court, and upon the testimony received without objection a finding that this palm oil served substantially only to color the product can not be disturbed (p. 165).

If the contention of counsel for plaintiff in error were correct, that the *Cliff* case decided merely as to palm oil operating solely to color, without the slightest other effect, then the use of the word "substantially" in the phrase "substantially only to color" was superfluous and unmeaning; though this court carefully repeated that word time and again.

II.

Simple and inevitable logic compelled the rule of the Cliff case; and the same logic applies equally to an article which does nothing but color oleomargarine like butter and to an article which, though it be said to have some other slight effects beside coloring, has no substantial result but to color.

The law regards only substantials. If palm oil in a quantity less than 1 per cent of the total weight or volume of oleomargarine does nothing important but color, the case is within the maxim "*De minimis*

non curat lex," as respects the trifling results apart from color.

It being admitted that palm oil or other substance is an artificial colorant if it does nothing but color, where can a court draw the line at which the use of such substance becomes something else than coloration, *short of the accomplishment of other substantial purposes in a substantial degree?*

Indeed, it is doubtless true that no substance can be imagined which has only one property or effect in any degree; but substances are numberless which have only one substantial or important property or effect.

III.

The mere fact that the substance used to give butter color to oleomargarine is enumerated in the statute as one of the things whose presence in the "mixtures and compounds" denominated generally as oleomargarine will not relieve the mixture or compound from the operation of the law, does not make butter coloration through the use of such substance natural instead of artificial. The true distinction is unconnected with the statutory enumeration and must be discovered elsewhere, viz, in the true nature of oleomargarine as universally recognized, and not altered by the statute, or in the natural relation of the colorant to the end—i. e., butter color—sought to be accomplished.

1. Both the *Cliff* case and the *McCray* case, *supra*, directly held that it is not enough to make any substance a natural colorant of oleomargarine that it is named in the statute as a thing that may be found in oleomargarine. The *McCray* case held this as to artificially colored butter, which is itself named in the statute as a possible constituent (secs. 1 and 2 of the act of 1886; 24 Stat., 209). The *Cliff* case

held it as to palm oil, which is one of the "vegetable oils" named in the statute.

2. As was reasoned in the *McCray* and *Cliff* cases, annotto (an admitted colorant) is also named in the statute; and "other coloring matter" is also named. These things, therefore, would be natural colorants if the statutory description of what should be subject to the oleomargarine law is enough to decide the matter.

3. Innumerable other substances not expressly named in the statute may be mixed with those that are named and still leave the mixture subject to the statute. The law operates upon compounds, not only of things named in the act, but also of those things and extraneous things not named. It is a fundamental error to suppose that the statute defines either the only or the essential ingredients of oleomargarine. On the contrary, the statute leaves oleomargarine what it was before the statute was enacted, and merely states what things—whether by themselves or in mixture with others named in the act or in mixture with others not named in the act—shall fall under the regulations and taxes which the statute imposes. If, therefore, the things named in the act must be considered "natural" or "authorized" ingredients of oleomargarine, so equally must all other things not named in the act, for the statute reaches to them when mixed or compounded with anything enumerated in the statute no less than it reaches to mixtures and compounds of enumerated things.

4. Nor does the change which the amendment of section 8 of the act of 1886 by section 3 of the act of 1902 (32 Stat., 193) underwent in Congress, through omission of the word "ingredient" from the proviso of 1902, show or tend to show any purpose to classify the things enumerated in the statute, or even all those things not expressly denominated "coloring matter," as natural colorants. This subject was treated in the *McCray* case as follows:

> Nor is there force in the contention that the plain meaning of the statute is overcome by an amendment to which it was subjected. Before the amendment relied on, the proviso read as follows: "*Provided*, when oleomargarine is free from coloration *or ingredient* that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound." By the amendment the word "ingredient" was stricken out, thus leaving the proviso in the form in which it was enacted. The proposition is that the elimination of the word "ingredient" compels to the conclusion that wherever artificial coloration in the finished product of oleomargarine was produced by artificial coloration used in an authorized ingredient, that such coloration was not artificial within the statute. But this disregards the fact that butter, both when artificially colored and when not so colored, was made an authorized ingredient of oleomargarine. If then the word "ingredient" had not been stricken out, it might have given rise to the contention that the imparting of a yellow

> color to the finished product of oleomargarine by the use in its manufacture of spring butter of a natural yellow color would have caused the product oleomargarine to be artificially colored within the statute (pp. 48–49).

If the word "ingredient" had not been stricken out, even coloration by butter or by animal fats (so far as any are yellow enough for the purpose) would have put the 10 cents per pound tax on oleomargarine. Then *any* ingredient giving butter color would have had that result. The elimination of the word "ingredient" can be given no purpose but to avoid that result. It does not follow, however, from a legislative willingness to permit butter color, without enhanced tax, through use of some statutory constituent, that it was intended to permit it through the use of *all* or of *any particular* ingredient. The only allowable inference from the statutory change is that *not every* ingredient giving butter color causes artificial coloration. We are still left to find, by some other test, what coloring ingredients are natural and what are artificial.

And the insertion of the word "artificial" before "coloration," which was made when "ingredient" was left out, is no more significant. If the statute had been made to read merely that oleomargarine "free from coloration," causing it to look like butter, shall pay only one-fourth cent per pound, then, still, *any* ingredient, even butter, giving butter color would subject the oleomargarine to the 10-cent tax. The insertion of the word "artificial" was only a

necessary accompaniment of the plan to avoid making a higher tax attach because of actual butter color, however caused.

5. The result, therefore, is reached that the mention in the statute of "vegetable oils" among the things which in given compounds shall be subject to the oleomargarine law throws no light whatever upon the problem whether a vegetable oil is a natural or artificial colorant. The truth is that the statutory list was not intended to define what oleomargarine truly is or to decide whether any particular substance is essential or natural to it, but was intended merely to prevent beyond question the escape of any real oleomargarine compounds from the reach of the law through the addition to them of any substance which Congress thought might probably be added.

As the statutory enumeration does not afford the means of separating natural from artificial colorants where shall we look for that distinction? Only two answers seem possible. First—and, it would seem, necessarily—the test may be found in the real nature of oleomargarine as shown by the history of its manufacture and by the universal conception of the article. Second—instead of or in addition to the first test—the means of discrimination may be found in the naturalness or artificiality of the colorant with reference to the ends sought, i. e., butter color. I shall treat these two tests in Points IV and V; and both will be found to lead to the same result, viz, that only animal fats are the natural constituents of oleomargarine, and butter is the only natural colorant.

IV.

The things truly natural to oleomargarine—that is, which produce the essential nature or character of oleomargarine—must be determined by the history of its manufacture and by the established general conception of oleomargarine. By those fundamental tests, oleomargarine is an article manufactured from animal fats; and a vegetable oil is a foreign, and so artificial, addition to oleomargarine, just as much as if it were not named at all in the statute and just as much as any one of the unnumbered substances, not named in the statute, which may be added to true oleomargarine without taking the mixture or compound out of the statute. When, therefore, a substance is added to oleomargarine which, like palm oil, is foreign to the true nature of oleomargarine, any resultant qualities are artificial; and if butter color is one of those added qualities we have a case of artificial coloration, whether or not other qualities than color are given by the same foreign addition.

1. If oleomargarine were a newly invented product or one which had been little used, the ascertainment of its true nature and essential ingredients might not be easy. But such is not the case. Oleomargarine was invented nearly forty years ago and has been largely and increasingly used ever since. Not only so, but there is probably no other article of food which has given rise to so much discussion and legislation. Accordingly, it soon became one of those articles of food concerning whose nature or characteristics and ingredients the courts were able to take judicial notice. This court so held in the case of *Schollenberger* v. *Pennsylvania* (171 U. S., 1), which involved the validity of a statute of Pennsylvania prohibiting the sale of oleomargarine in that State. The case involved an examination into the nature of oleomargarine, but there was no evidence

on that subject in the record. The court, however, determined the matter upon the facts of which it could take judicial notice, and had recourse to various works of reference (see pp. 8–10), saying:

> In this particular case we have no difficulty in holding that oleomargarine has so far ceased to be a newly discovered article as that its nature, mode of manufacture, ingredients and effect upon the health are and have been for many years as well known as almost any article of food in daily use (p. 15).

There is no difficulty, therefore, about ascertaining the true nature and composition of oleomargarine. We need only turn to any standard reference work. None is better than the Encyclopædia Britannica; and its discussion of oleomargarine is both authoritative and typical. It says, in brief, that in 1870 a French scientist, M. Mêge-Mouries, "having surmised that the formation of butter contained in milk was due to the absorption of fat contained in the animal tissues," was led "to experiment on the splitting up of animal fat," with the result that he discovered a process whereby he was able to extract from beef suet a fat very similar to that of butter. This fat he churned with milk and water, adding annotto for coloring purposes. "The compound so obtained, when well washed was in general appearance, taste, and consistency like ordinary butter." (Encyc. Britannica (9th ed.), vol. 4, p. 592; Title, "Butter.") For additional descriptions of oleomargarine see Encyc. Americana, Vol. XI, Title, "Oleomargarine;"

Standard Dictionary, Vol. II, pp. 1225, 1226; Century Dictionary and Cyclopedia, Vol. V, p. 4101.

As would be naturally expected, the processes for the manufacture of oleomargarine have undergone many changes since M. Mège-Mouries's time. The process by which the oleo is extracted from the suet has been improved or simplified. It has been found that an extract similar to that obtained by M. Mège-Mouries from beef suet can be obtained from lard. The former is known as oleo or oleo oil and the latter as neutral lard or, sometimes, neutral (Encyc. Americana, *supra*); and both these substances are now universally used in manufacturing oleomargarine. (Reports of Twelfth Federal Census, *infra*.) Also, in the best grades of oleomargarine, pure butter, and, in medium grades, cream, in place of or in addition to milk, is used as an ingredient. (Encyc. Americana, *supra;* Reports of Twelfth Census, *infra*.) But none of these changes has substantially affected the nature of oleomargarine. It is apparent therefore that *fundamentally* oleomargarine is an extract from animal fats, mixed with milk or cream or butter itself for the purpose of imparting to it the natural flavor and other characteristics of butter; and milk, cream, and butter are themselves fatty animal products.

Not only is it true that the fundamental ingredients of oleomargarine are only extracts from animal fats and butter, or milk or cream, but it is also the fact that the better grades of oleomargarine *contain no other ingredients*, except coloring matter

and salt, which will hereafter be dealt with. Hence it is obvious that the only *essential* ingredients of oleomargarine are the animal fats and the butter fat; and, further, that they are the only *universal* ingredients. It follows that the distinguishing characteristic of oleomargarine is its derivation from animal fats; just as the distinguishing characteristics of linen, muslin, whisky, brandy, and rum are that they are made from flax, cotton, grain, fruit, and molasses, respectively.

It may be claimed, however, that vegetable oils have by custom become, if not essential, at least proper ingredients of oleomargarine. Anything is perhaps a proper ingredient if it is not introduced in quantity sufficient to swamp the fundamentals and so produce an article for which the name "oleomargarine," with its established public significance, is misleading. We are inquiring, however, what is the essential conception of oleomargarine—what is its fundamental nature. That certainly is a product of animal fats. *Vegetable oils, if used in small quantity, may not destroy the true nature; but, on the other hand, they do not give it.* Animal fats have always been employed as the fundamental constituents—they commonly have been used alone—and vegetable oils, when used at all, have been employed in small amount as incidentals rather than true elements. In fact, it is only in cheaper grades of oleomargarine that vegetable oils have been introduced at all, unless it be for color alone, and then they are used as cheapening devices. Thus it is said in the

Reports of the Twelfth Federal Census (vol. 9, Manufactures, part 3, p. 521), as follows:

> Practically all the oleomargarine manufactured in the United States is made by the simple process of churning a melted mixture of oleo oil and neutral lard with milk, cream, or melted butter to give it the butter flavor, and coloring matter to give it any desired shade of yellow in semblance of butter. In the cheap grades cotton-seed oil is often substituted for a portion of oleo oil and neutral lard, but never to the total exclusion of either.

On the subject of the use of vegetable oils and like ingredients, the Encyclopaedia Americana, *supra*, says:

> Certain other substances, such as cotton-seed oil, sesame oil, sugar, glycerine, and glucose are used to some extent by a few, usually unimportant makers.

In their letter to the Standard Dictionary, dated April 10, 1891, and published in that work in connection with the definition of oleomargarine, Armour & Co., one of the largest manufacturers of oleomargarine, did not even mention vegetable oils as occasional ingredients. The letter stated that—

> * * * it may be safely said that all *oleomargarine* is made from oleo oil, neutral lard, milk and cream, and pure butter, although pure butter is not used in all grades.

And vegetable oils only appear in one formula (and that the cheapest) out of the three formulæ given by the stated census report as the general formulæ

according to one or another of which all oleomargarine is manufactured. Those formulæ are as follows:

Formula 1—Cheap grade.

	Pounds.
Oleo oil	495
Neutral lard	265
Cotton-seed oil	315
Milk	255
Salt	120
Color	1¼
Total	1,451¼

This will produce from 1,265 to 1,300 pounds of oleomargarine.

Formula 2—Medium high grade.

	Pounds.
Oleo oil	315
Neutral lard	500
Cream	280
Milk	280
Salt	120
Color	1½
Total	1,496½

This will produce from 1,050 to 1,080 pounds of oleomargarine.

Formula 3—High grade.

	Pounds.
Oleo oil	100
Neutral lard	130
Butter	95
Salt	32
Color	¼
Total	357¼

This will produce about 352 pounds of oleomargarine.

In view of these facts it is impossible to contend that vegetable oils are used or viewed as *natural* ingredients of oleomargarine. Especially is this so in view of the fact that vegetable oils are generically and

inherently different from the essential and characteristic ingredients of oleomargarine. It might as well be contended that citric acid is a natural ingredient of lemonade or that gelatin is a natural ingredient of ice cream because they are sometimes and even largely used to cheapen the cost of lemonade and ice cream, respectively.

The only other ingredients which need consideration are salt and coloring. About them little need be said. As to salt, it is sufficient that it is in no way involved in this case. Probably it would not be proper to regard it as a natural ingredient, because it is a mere incidental seasoning or flavoring. Coloring is obviously not a natural ingredient, though it has been used most extensively.

It is clear, therefore, that derivation from animal fats is as essential to oleomargarine as is derivation from grain to whisky, from molasses to rum, from fruit to brandy, from flax to linen, from cotton to muslin, or from the cocoon of the silkworm to silk. Further, it appears that vegetable oils and other ingredients not derived from animal fats not only are not essential, but are not even generally used. *The only ingredients, then, which can be considered natural to oleomargarine are the animal (including butter) fats.* Of these, oleo oil (Century Dictionary and Cyclopedia, *supra*, and Encyclopædia Britannica, *supra*) and butter are naturally of a yellow or yellowish color; but the yellow tinge of oleo is very slight and that of butter varies greatly at different seasons of the year.

Neutral lard is white. Hence the only ingredients of oleomargarine which will cause it to look like butter of any shade of yellow are oleo oil and butter. It results that any vegetable oil or any ingredient other than oleo oil or butter which imparts a yellow color is an artificial colorant.

2. Several practical considerations strongly support this construction of the law.

(*a*) The effect of oleo oil as a colorant is of course negligible. Practically, therefore, butter is the only one of the above-enumerated "natural" ingredients which can be regarded as serving the function of coloring matter; and there are good reasons for not requiring the higher tax merely because butter is used to give oleomargarine a butter color. In the first place, butter itself is not a strong colorant. The quantity of butter ordinarily used in oleomargarine is not sufficient to produce a substantial resemblance to butter in the finished product. This is shown by the fact that, according to accepted formulæ, coloring matter is generally added, even though butter is one of the ingredients of the oleomargarine. It is, therefore, entirely reasonable to suppose that Congress did not regard the use of butter, in slight quantity, as likely to result in giving oleomargarine a sufficient resemblance to butter to warrant the higher tax. In the second place, although a substantial and deceptive resemblance to butter be imparted to oleomargarine by the use of a sufficient quantity of butter, still there is a sound reason for waiving the higher tax in case

of the use of the large quantity of butter necessary to produce this result, because in imposing the higher tax upon the oleomargarine colored so as to look like butter Congress must have intended to reach by the higher tax the fictitious value given to the oleomargarine by the means of its butter coloring. But, since butter is the more expensive product, the use of a large quantity of it in the manufacture of oleomargarine would materially increase the cost of that product and therefore lessen the fictitious value of the oleomargarine. If the oleomargarine is colored by the use of a small quantity of a cheap ingredient, the fictitious value is large; because, although the cost of its production is much less than the cost of butter, its selling price approximates the selling price of butter. If, however, a large quantity of butter is used, the cost of the oleomargarine approaches that of butter and the fictitious value correspondingly decreases. Further than that, the finished product itself more nearly resembles butter in every way. Accordingly, it is fair to presume that Congress distinguished between the use of butter and the use of other ingredients for the purpose of coloring the product.

(*b*) By construing the term "artificial coloration" as including all color-giving ingredients except butter and other animal fats, a simple and feasible test is established for determining the amount of the tax — a test capable of application with exact and certain results; that closes the door to fraud and evasions of

the tax; and that does not involve ascertainment of the motive actuating the use of any ingredient or comparison of the various functions of a given ingredient in order to decide which are dominant or substantial and which are incidental or slight.

On the other hand, if a vegetable oil or anything else (whether named in the statute or not) may be considered a natural colorant in case beside coloring like butter it has some further innocuous effect, this oleomargarine legislation will speedily become ineffectual either to reach the fictitious value given to oleomargarine (above its cost) by butter color and the consequent opportunity for its sale at or near butter prices or to protect true butter against deceitful competition. If this court announce that *anything* which does *something* beside coloring like butter is a natural colorant it will not be long before the statutory obstacle in the way of deceptive coloration of oleomargarine is brought to naught.

> There is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience. (*Bird* v. *United States*, 187 U. S., 118, 124.)

3. Nothing in the *McCray* or *Cliff* case is inconsistent with the view that by artificial coloration the statute means any coloration otherwise than by the use of animal fats, including butter. Those decisions attempted no general rule. Further, in the *McCray* case, an artificial coloration of the butter

ingredient was undisputed. The *Cliff* case, besides being consistent with the test now advanced, somewhat foreshadows it. The substantial function beside coloring which the *Cliff* case required, to make a colorant natural, must be (as now contended) a function accordant with and involved in the true nature of oleomargarine, viz, supply of animal fat and its properties—not of foreign elements and foreign properties.

V.

If the natural or artificial character of coloration of oleomargarine by the addition of palm oil is not to be determined by the universal conception of oleomargarine as a product of animal fats, the only remaining test is whether the colorant is natural with reference to the end sought, viz, butter color. By that test, only butter itself is a natural colorant; anything else is artificial. This test, too, leads to the same practical result as that urged in Point IV; for the only animal fat that will give butter color is butter itself.

If the test for discrimination between natural and artificial colorants be not derived from the essential and publicly recognized nature of oleomargarine, it must be obtained from the nature of the end sought, i. e., butter color. *The means must be natural to the end.* In this view, the only natural way of making oleomargarine or anything else look like butter is to use butter.

Is not the extract of the vanilla bean the "natural" means of giving to ice cream a vanilla flavor? Is not brandy the "natural" means of giving brandy flavor to preserved peaches? Suppose a statute taxing ice

cream which possesses vanilla flavor through "artificial flavoring," would not any flavoring but the extract of the vanilla bean be artificial? Or suppose a statute taxing preserved peaches having a brandy flavor through "artificial flavoring," would not any flavoring but brandy itself be artificial? Why, then, in a statute taxing oleomargarine possessing butter color through "artificial coloration," is not any coloring substance but butter artificial?

This test is fully in accord with the usage of general speech; and the coincidence, in their practical result, of this test and of the test derived from the true character of oleomargarine, strongly cumulates the argument.

It is to be remembered, also, that the use of butter as a colorant of oleomargarine, as well as for its own contribution of special animal fats, is no new thing. It had been extensive before this statute was passed, and seems indeed to have been general in high grades of oleomargarine.

The practical propriety and justice of lessening the tax when butter is used in sufficient quantity to give oleomargarine a yellow shade like that of some butters has already been argued. In brief, the fictitious value of oleomargarine (derived merely from resemblance to butter and the consequent opportunity for sale at or near butter prices) is then largely eliminated, and the special and just basis for high taxation of oleomargarine colored like butter is then removed.

VI.

The statutory proviso, relieving naturally colored oleomargarine from the general tax of 10 cents per pound, is not to be construed liberally in favor of the manufacturer. The statutory distinction between naturally and artificially colored oleomargarine has a remedial purpose, namely, protection of the purchasing and consuming public against deception through imposition upon them of articles which are neither true butter nor true oleomargarine. Such remedial legislation must be construed liberally toward accomplishment of the legislative purpose.

1. Plaintiff in error claims to be entitled to the benefit of a proviso in the statute, and all fair doubts are to be resolved against such a claim. The general rule on this subject was well stated in the leading case of *United States* v. *Dickson* (15 Pet., 141, p. 165), as follows:

> Passing from these considerations to another, which necessarily brings under review the second point of objection to the charge of the court below, we are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof.

This statement of the rule was approved in *Ryan* v. *Carter* (93 U. S., 78–83). Multiplication of authorities is unnecessary in support of such a familiar proposition. Further, this court in terms decided in the *Cliff* case that the rule applies to a person claiming the benefit of the proviso of section 8 now under consideration, saying—

> It will be noted that the regular tax imposed upon oleomargarine by section 8 is 10 cents a pound, the exception thereto being stated in the proviso, and *a party who claims the benefit thereof must make it clear that his oleomargarine is within its scope*. (195 U. S., p. 163.)

2. This oleomargarine legislation, though in part a revenue measure, has also remedial purposes. Even the tax itself was undoubtedly induced by the remedial purpose of preventing or lessening the deceitful imposition upon the public at or near butter prices of an article not butter or very like butter. Every part of the statute, therefore, should be construed favorably toward the accomplishment of this object. In the *Cliff* case it was said that "one of the purposes of this legislation was to prevent the sale of oleomargarine as and for butter" (pp. 163, 164). If, as already said, this court decides that *anything* which does *something* in oleomargarine beside coloring it like butter is a natural colorant, so that the butter-colored oleomargarine need pay a tax of only one-fourth cent per pound, there will speedily be on the market none but butter-colored oleomargarine, whatever its constituents or its quality. The remedial purpose of the statute will be utterly defeated.

VII.

As to the practical disposition of the case—

1. The first certified question must be interpreted in the light of the statement of facts, with the result that it presents the case of palm oil being used as a colorant without accomplishing any other substantial result in substantial degree; and, accordingly, this first certified question must be answered in the affirmative, on the grounds of Points I and II. Response to the second and third questions then becomes unnecessary.

2. If the words "in some degree" in the first certified question can not be construed in harmony with the actual facts of the case, then the first question becomes moot, and the certificate should be dismissed; or the whole case should be brought here by certiorari for disposition on its real merits.

3. If, however, the statement of facts is held to show that the palm oil in this case operates to produce substantial effects in substantial degree beside coloring, then still the first certified question must be answered in the affirmative, on the grounds of Points III, IV, and V.

4. In any of the three preceding situations consideration of the second and third certified questions becomes unnecessary.

LLOYD W. BOWERS,
Solicitor-General.

DECEMBER, 1909.

O

WM. J. MOXLEY, A CORPORATION, *v.* HERTZ, UNITED STATES COLLECTOR.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 398. Argued December 13, 14, 1909.—Decided February 21, 1910.

Where the function of a natural ingredient, such as palm oil, used in manufacturing oleomargarine is so slight that it probably would not be used except for its effect in coloring the product so as to look like butter, the product is artificially colored and subject to the tax of ten cents a pound under par. 8 of the act of May 9, 1902, Chap. 784, 32 Stat. 193.

As the record in this case shows that the use of palm oil produced only a slight effect other than coloration on the product, it falls under the rule adopted in *Cliff* v. *United States*, 195 U. S. 159, that the use of a natural ingredient must be for something more substantial than coloration in order to relieve the oleomargarine of the tax of ten cents a pound.

A statute may not be evaded, nor its purpose made to yield to what is non-essential and thus render it a means to accomplish the deception it was meant to prevent.

THE facts are stated in the opinion.

Mr. John Maynard Harlan for Moxley & Co.

By the special finding in this case palm oil is shown to be one of the unartificially colored legal component parts of oleomargarine referred to in the Treasury Department's Regulations as to artificial coloration of June 2, 1902. This a fair and reasonable interpretation consistent with the language and purpose of the statute and should not be lightly departed from. *United States* v. *1412 Gallons*, 10 Blatchf. 428. This interpretation is not overruled by the *Cliff case*, 195 U. S. 159. The fact distinguishing the *Cliff case* from the case at bar is just this: that the plaintiff in error herein has proved, and the trial court has found, palm oil to be a food ingredient of oleomargarine, while in the *Cliff case* it was conceded, in effect, that palm oil was merely a color ingredient. In fact the *Cliff case* taken in connection with *McCray* v. *United States*, 195 U. S. 27, logically requires all the certified questions to be answered in the negative.

"For the purpose of assessing the statutory tax on the oleomargarine described in the first question," the rate of taxation is not "dependent, either upon the ratio which the quantity of palm oil used bears to the other ingredients, or the extent or ratio of other benefits than that of coloration given by the palm oil."

The fact that the manufacturer intended and used the palm oil for the coloration of the oleomargarine cannot enter into the determination of the amount taxable under the statute. Taxes are laid upon things, not upon motives. *Merritt* v. *Welsh*, 104 U. S. 694; *Seeberger* v. *Farwell*, 139 U. S. 608; *Magone* v. *Luckemeyer*, 139 U. S. 612; *United States* v. *Schoverling*, 146 U. S. 76, 81; *United States* v. *Irwin*, 78 Fed. Rep. 799.

If there be any doubt, under the law, whether plaintiff in